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Supreme Court of the United States

OCTOBER TERM, 1965

No. 49

UNITED GAS PIPE LINE COMPANY,
PETITIONER,

vs.

FEDERAL POWER COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 8, 1966
CERTIORARI GRANTED FEBRUARY 22, 1966

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21693

UNITED GAS PIPE LINE COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

CONTINENTAL OIL COMPANY, *Intervenor.*

On Petition to Review an Order of the Federal Power Commission

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JOINT APPENDIX

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(1)

BEFORE THE FEDERAL POWER COMMISSION

Docket No. CI63-979

In the Matter of:

CONTINENTAL OIL COMPANY

Hearing Room F-G
Federal Power Commission
441 G Street, Northwest
Washington, D. C.

Monday, June 3, 1963

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

ALVIN A. KUBTZ, Presiding Examiner.

APPEARANCES:

TOM BURTON and
BRUCE R. MERRILL,
P. O. Box 2197, Houston, Texas,
appearing on behalf of Continental Oil Company.

W. O. CRAIN,
SAUNDERS GREGG,
DAVID KLOTZ,
1525 Fairfield Avenue, Shreveport, Louisiana,

VERNON WOODS and
WILLIS L. MEADOWS,
Box 1707, Shreveport, Louisiana,
appearing on behalf of United Gas Pipe Line Company.

JACK D. HEAD,
Vice President and General Counsel,
P. O. Box 2521, Houston, Texas
and

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APPEARANCES (Continued):

KEITH M. PYBURN,
852 Pennsylvania Building,
Washington, D. C.,
appearing on behalf of Texas Eastern Transmission Corporation.

C. LOUIS KNIGHT,
Staff Counsel,
appearing on behalf of the Staff of the Federal Power Commission.

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PROCEEDINGS

PRESIDING EXAMINER: Hearing on the petition filed by Continental Oil Company for an order to show cause in Docket CI63-979 will be in order.

Continental Oil Company requests that the Commission issue an order directing United Gas Pipeline Company to show cause why it should not be required to continue taking gas in accordance with Continental Oil Company's FPC Gas Rate Schedule No. 115, as supplemented, and further requests order that United Gas Pipeline Company take such gas pending action on the order to show cause.

United Gas Pipeline Company filed an answer to the petition of Continental Oil Company praying such petition be rejected and dismissed.

Texas Eastern Transmission Corporation has filed a petition to intervene in opposition to the Continental Oil Company petition, and on May 31, 1963, the Commission issued an order permitting the intervention of Texas Eastern Transmission Corporation.

On May 24, 1963 I was designated by the Chief Examiner to preside at this hearing.

I now hand to the reporter a Memorandum from the Records Officer relating to the publication and notice of this hearing and directing it be copied into the record at this point.

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(The Memorandum of the Records Officer is as follows:)

FEDERAL POWER COMMISSION

May 15, 1963

In the Matter of Continental Oil Company
Docket No. CI63-979

MEMORANDUM FOR THE PRESIDING EXAMINER

The records in the Office of Administration show that notice of the hearing scheduled to commence on June 3, 1963 in the above-entitled matter was published in the Federal Register on 5/8/63; 28 FR 4634, and issued May 1, 1963 to the parties and interested persons of record and to States or other governmental authorities deemed to have an official interest in the proceeding.

/s/ EDWARD P. SEFCIK
Edward P. Sefcik,
Records Officer

PRESIDING EXAMINER: Appearances will be entered.

For the applicant, or petitioner, rather.

MR. BURTON: Our appearances have been entered on behalf of myself and on behalf of Mr. Bruce Merrill.

MR. WOODS: For United Gas Pipeline Company, Mr. Examiner, I enter the following appearances: W. O. Crain, Saunders Gregg, David Kotz, 1525 Fairfield Avenue, Shreveport, Louisiana; Willis L. Meadows and myself, Vernon Woods, Post

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Office Box 1707, Shreveport, Louisiana.

Presiding Examiner: Texas Eastern?

Mr. Pyburn: Jack D. Head, Vice President and General Counsel, Post Office Box 2521, Houston, Texas, and myself, Keith M. Pyburn, 852 Pennsylvania Building, Washington.

Presiding Examiner: Staff?

Mr. Knight: For the Staff of the Federal Power Commission, C. Louis Knight.

Presiding Examiner: Are there any other parties?

Hearing none, Mr. Burton, do you wish to make an opening statement?

Mr. Burton: Your Honor, at this time, for brevity, let me rely on the statement of position of petitioner which was filed by Continental Oil Company in response to the Commission's order instituting this proceeding, filed about the 13th or 14th of May, and in just sort of summary our position there is basically as it was in our petition for an order to show cause.

We are in agreement with the Commission's action here in instituting the proceeding, we believe the Commission has put the issue before the parties and has put it in hearing in this case.

We do submit, however, that perhaps the comment is appropriate that this is not to our thinking or in our reading of the Commission's order in any respect an

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abandonment proceeding. Continental has not applied for an abandonment under Section 7 and Continental contends there is a need for this gas to remain attached to the United system and to the public served by that system.

United has not filed an application for an abandonment, so such cannot be an issue here. This is simply a proceed-

ing requiring United to show cause why United should not apply for abandonment before ceasing operation of facilities by which United has taken Continental's Johnson Bayou gas.

We submit although the Commission's order directs United to show such cause before United ceases operation of the facilities by which United has taken Continental's Johnson Bayou gas—the petition originally filed by Continental goes a bit further and would properly in the final disposition of this case ask for and require the Commission to direct United to continue taking Continental's gas.

The order to show cause filed by the Commission doesn't go this far but I think the ultimate order in this proceeding should do so. The Commission's order to show cause relates to half of Continental's argument, respecting the abandonment of facilities by United.

Continental has also submitted in its petition United has by ceasing taking from Johnson Bayou abandoned service within the meaning of Section 7 of the Natural Gas Act, without complying with that section.

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The service here is that involved by having committed and continuing to have committed and subject to continuing taking the Johnson Bayou gas of Continental which has estimated remaining life of 16 years and reserve of six billion cubic feet remaining still in the ground.

This service is part of the entire supply which United has attached to its system and which United has previously always relied upon as part of its overall supply, so we would submit not only can United not cease operation of facilities, but United cannot cease the service which is involved in taking the gas Continental has committed to United's system.

Presiding Examiner: Mr. Burton, do you happen to have with you another copy of your petition that was filed on February 1? I don't want to take your only copy, I have an official file here, but ours seems to be lacking. I have three items that would be of convenience to me: That is, your petition, and your brief in support of the petition, and the filings of February 6 and of May 14, filed statement of position of petitioner.

Mr. Burton: I certainly have copies of the last two, Your Honor. I will see if I have a copy of the petition.

I do have the original petition, the brief in support of that petition, the statement of position to which Your Honor referred, and I would also give you at this time, and have given other parties in the room copies of a reply of

Continental Oil Company to the answer of United Gas Pipeline Company to order to show cause, filed with the Commission over the weekend.

Service has been made on all parties. I didn't know who the Presiding Examiner would be, but service has been made during the hearing today on the parties and by mail to them, and I now give you a copy of that.

Presiding Examiner: Thank you.

Mr. Woods: United Gas Pipeline Company's position is set out at length in its answer and brief in support thereof. I would be glad to elaborate.

Presiding Examiner: No, I thought perhaps you had something to add.

Mr. Woods: Nothing to add, sir. I would say the procedure of filing an answer to a brief is in itself unusual as far as I am concerned. I have received a moment ago a copy of a document, which I have not read, from Mr. Burton. I don't know whether or not this is an appropriate pleading.

Frankly, we have had several responsive filings in this proceeding already, starting with the petition by Continental, a brief. United answered that, filed a brief. Continental attempted to file reply to our brief. That was rejected. We tried to reply to Continental's reply, that was rejected, then the Commission came out with an order directing United to start over and file an answer and brief, which we did

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within the limit of time prescribed. There was no provision in the order permitting Continental to file a still further pleading, now we have this matter this morning. I object, because it seems to me there is no procedure contemplating filing of such document at this time.

Presiding Examiner: That is a matter that the Commission would like to pass on, I imagine. It is a procedural matter.

Mr. Pyburn: Texas Eastern's position is stated in its brief. It will present no evidence, it desires to be heard by the Examiner and the Commission.

Presiding Examiner: Thank you.

Mr. Knight: Staff desires to reserve any statement of position to a later time. This hearing I believe is on a rather limited legal issue which I believe Mr. Burton has very well stated; namely, whether the United Gas Pipeline Company is required by law to apply to the Commission for permission to cease operating any facilities which it uses in purchasing gas from Continental, or to cease purchasing gas.

I think the Commission so framed its order as to preclude at this time any hearing on the question of whether the Commission should order United to continue the purchase of gas, but hold it on that legal question of whether United must apply for permission before discontinuing the purchase of gas.

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Presiding Examiner: Gentlemen—excuse me.

Mr. Knight: That will include also I think perhaps the question of whether anything United has done to date constitutes abandonment of facilities within the meaning of the Natural Gas Act.

Presiding Examiner: You may proceed.

Mr. Woods: As we see it, the force of a show cause order puts the burden of going forward on the respondent. Under those circumstances we would call Mr. Barnett.

Whereupon,

C. C. Barnett

was called as a witness, and having been first duly sworn, was examined and testified as follows:

Mr. Woods: In connection with this witness' testimony there are a number of items that it might be helpful to have identified before we start.

Presiding Examiner: Very well.

Mr. Woods: These items are already included in filings made with the Federal Power Commission, and I will attempt to have them marked for identification by reference to the Commission's files.

First I ask there be identified a gas purchase contract, on file as Continental Oil Company FPC Gas Rate Schedule 115. The contract is dated January 22, 1953.

I have a copy of that in my hand, which I give to the

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reporter, consisting of 22 pages.

May that be identified as Item A by reference to the Commission's files?

Presiding Examiner: It will be so marked for identification.

(The document above referred to was marked as Item A, by reference, for identification.)

Mr. Woods: The other documents, with the exception of one, are attached to United's answer and are therefore given exhibit numbers.

May I ask that there be identified as Item B——

Presiding Examiner: Just a moment. Did you say attached to your answer?

Mr. Woods: Yes, sir.

—identified as Item by reference to the Commission's files a letter bearing the letterhead "Continental Oil Company," addressed to United Gas Pipeline Company, dated October 23, 1962. It is two pages in length and is attached to the answer of United Gas Pipeline Company, filed to the show cause order, there designated as Exhibit A.

May that be identified as Item B by reference to the Commission's files?

Presiding Examiner: So identified.

(The document above referred to was marked as Item B, by reference, for identification.)

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Mr. Knight: Did you say that was on the letterhead of Continental?

Mr. Woods: Yes, sir.

Mr. Knight: The Exhibit A that I have here is on the letterhead of United Gas Pipeline.

Mr. Burton: That is another answer, I believe.

Mr. Woods: It would be helpful to have the record reflect I referred to the answer filed on May 20, 1963, in response to the show cause order.

May the next item be identified as Item C by reference to the Commission's files, a letter consisting of one page, bearing the letterhead of United Gas Pipeline Company, addressed to Continental Oil Company, dated December 17, 1962, and attached to United's answer to the show cause order, and there identified as Exhibit C.

Presiding Examiner: It will be so marked for identification.

(The document above referred to was marked as Item C, by reference, for identification.)

Mr. Woods: Next is a letter on the letterhead of United Gas Pipeline Company addressed to Continental Oil Company, dated December 20, 1962. That letter is attached to United's answer to the show cause order, and there identified as Exhibit C.

May that, sir, be identified as Exhibit D by reference

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to the Commission's files?

Presiding Examiner: It will be so identified.

(The document above referred to was marked as Item D, by reference, for identification.)

Mr. Woods: Next is a letter consisting of two pages on the letterhead of United Gas Pipeline Company, addressed to Continental Oil Company, dated December 26, 1962. That letter also was attached to the United Gas Pipeline Company's answer to the show cause order. It was there identified as Exhibit D.

May that be identified by reference to the Commission's files as Item E?

Presiding Examiner: It will be so identified.

(The document above referred to was marked as Item E, by reference, for identification.)

Mr. Woods: Next is a letter consisting of one page on the letterhead of Continental Oil Company addressed to United Gas Pipeline Company, dated December 28, 1962, there identified as Exhibit E.

May that be identified as Item F by reference to the Commission's files?

Presiding Examiner: It will be so identified.

(The document above referred to was marked as Item F, by reference, for identification.)

Mr. Woods: I believe lastly is the Commission's letter

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order dated January 25, 1963, addressed to the Continental Oil Company, in which the Commission notifies Continental Oil Company that it has accepted for filing Continental's supplement to its Rate Schedule 115 by which Continental effected unilaterally an increased price in the—applicable to Johnson Bayou field.

May that be identified as Item G by reference to the Commission's files?

Presiding Examiner: It will be so identified.

(The document above referred to was marked as Item G, by reference, for identification.)

DIRECT EXAMINATION

By Mr. Woods:

Q. Please state your name. A. My name is C. C. Barnett. Residing in Shreveport, Louisiana.

Q. By whom and in what capacity are you employed? A. I am employed by United Gas Pipeline Company of Shreveport, Louisiana, as vice president in charge of the company's gas supply.

Q. What is your primary responsibility in this capacity? A. I am primarily responsible for acquiring and maintaining for United a supply of natural gas adequate to meet its commitments to its customers.

Q. What business is United engaged in?

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A. United is engaged in the business of purchasing gas from producers, transporting it through pipelines and selling it to distributors and pipeline companies for resale, and to industries for their own use.

Q. Where are United's facilities located? A. They are located in the States of Texas, Louisiana, Mississippi, Alabama and Florida.

Q. Mr. Barnett, I show you a document bearing the caption "Gas Purchase Contract," which instrument is dated January 22, 1953, and which has been identified in this proceeding as Item A by reference to the Commission's files, and ask you to tell us what it is. A. Yes. That is a true copy of the agreement between Continental Oil Company and United Gas Pipeline Company, dated January 22, 1953, reflecting the terms and conditions of the sale and purchase of gas produced by Continental in the Johnson Bayou field, Cameron Parish, Louisiana.

Q. Did United purchase any gas under this agreement? A. Yes. After its execution United purchased and received Johnson Bayou field gas pursuant to the terms of that agreement, and continued to do so until January 31, 1963.

Q. Has United purchased gas produced in the Johnson Bayou field since January 31, 1963? A. No, it has not.

Q. I show you a letter dated October 23, 1962, which

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has been identified in this proceeding as Item B by reference to the Commission's files, and ask you if you can tell us what that is? A. Yes. That is a true copy of a letter from Continental to United, advising that it was cancelling as of January 31, 1963, the agreement between Continental and United covering the sale and purchase of Johnson Bayou field gas.

Q. Following receipt of this letter were there further communications between Continental and United concerning this gas? A. Yes. On November 21, 1962, representatives of Continental contacted us at United requesting that United agree to a new contract with Continental covering the Johnson Bayou field gas. Continental said it desired that the new contract include, among other things, a term of twenty years from and after January 31, 1963, and an increased price.

The increased price was to begin at a level of 14 cents per Mcf plus 1.75 cents per Mcf tax reimbursement for the first five years of the contract, and thereafter the price would increase one cent per Mcf each five years thereafter provided Continental could charge the applicable price determined by the Commission in its area rate proceedings if that price were higher than the contract price.

Q. Did United agree to these contract terms? A. No, it did not. United was not willing to pay

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the increased price demanded by Continental and did not need deliveries of Johnson's Bayou field gas——

Mr. Burton: I object to any testimony now or later about need for gas. That is not at issue in these proceedings. I move to strike the remarks of the witness.

Presiding Examiner: The objection is overruled.

By Mr. Woods:

Q. Did United agree to these contract terms? A. No. United was not willing to pay the increased price demanded by Continental and did not need deliveries of Johnson's Bayou field gas to deliver its customers' requirements, and so it did not agree to Continental's proposal.

United, in turn, advised Continental it would actively support an application by Continental to the Federal Power Comimssion for abandonment of this sale to United,

that in the meantime United would agree to continue buying Johnson Bayou field gas on a day-to-day basis at the existing contract term.

Q. I show you a letter dated December 17, 1962, from United Gas Pipeline Company to Continental Oil Company, which has been identified in this proceeding as Item C by reference to the Commission's files, and ask you if you can tell us what this is? A. That is a true copy of a letter from United Gas Pipeline Company to Continental Oil Company confirming that

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Continental's new proposal was not acceptable to United Gas Pipeline Company and that United would support an application by Continental to the Federal Power Commission for abandonment of this sale.

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Q. Now, I show you a document in the form of a letter dated December 20, 1962, from United Gas Pipeline Company to Continental Oil Company which has been identified in this proceeding as Item D by reference to the Commission's files and ask you if you can tell us what this is. A. Yes, it is a true copy of a letter from United Gas Pipeline Company to Continental Oil Company confirming United's advice to Continental that was willing to continue receipt of the Johnson Bayou Field Gas on a day to day basis from and after January 31, 1963, in accordance with the terms and provisions of the contract the parties had executed covering the sale and purchase of Johnson Bayou field gas.

Q. Now, I show you a document in the form of a letter dated December 16, 1962, from United Gas Pipeline Company to Continental Oil Company which has been identified in this proceeding as Item E by reference to the Commission's files and ask you if you can tell us what this is?

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A. Yes. It is a true copy of a proposed letter agreement submitted by United Gas Pipeline Company to Continental Oil Company covering the continued sale and purchase of Johnson Bayou field gas on a day to day basis from and after January 31, 1963.

Q. Mr. Barnett, looking at Item E, it shows it was signed by you on behalf of United Gas Pipeline Company, but

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it was not signed by Continental Oil Company. Does this mean that the parties did not reach agreement on this proposal by United? A. That is correct. The parties did not reach agreement on that proposal and Continental did not sign the letter agreement.

Q. Tell us what next occurred in the sequence of events. A. Continental advised United that it would insist on the higher price it had proposed to which United had refused to agree and that it would unilaterally file that higher price with the Federal Power Commission as the rate applicable to this gas.

Q. Now, I show you a document in the form of a letter dated December 28, 1962, from Continental Oil Company to United Gas Pipeline Company which has been identified in this proceeding as Item F by reference to the Commission's files and ask you if you can tell us what this is. A. Yes, it is a true copy of a letter dated December 18, 1962, from Continental Oil Company to United Gas Pipeline Company confirming Continental's oral advice that it was rejecting United's offer of December 26, 1962, and that it had elected unilaterally to file the increased price demanded by Continental with the Federal Power Commission as the rate applicable to this gas.

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Q. Did Continental in fact file with the Federal Power Commission the increased rate it had proposed to which

United had refused to agree? A. Yes. On December 28, 1962, Continental filed with the Federal Power Commission a notice that it was unilaterally increasing the rate applicable to the Johnson Bayou Field gas to 148 per Mcf at 15.025 psia, plus tax reimbursement of 1.75 cents per Mcf and it requested that the increased rate be made effective on and after January 31, 1962.

Q. Did United take any action with reference to that filing? A. On January 18, 1963, United filed with the Federal Power Commission a formal complaint protesting Continental's unilateral rate filing and asking that it be rejected.

Q. What action did the Commission take? A. By letter dated January 25, 1963, addressed to Continental the Commission advised that the increased rate unilaterally filed by Continental had been accepted for filing with effective date of January 31, 1963.

Q. I show you a document in the form of a letter dated January 25, 1963, from the Federal Power Commission addressed to Continental Oil Company which has been filed in this proceeding as Item G by reference to the Commission

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files and ask you if you can tell us what this is. A. That is a true copy of the letter addressed to Continental by the Federal Power Commission to which I just referred advising that the increased rate unilaterally filed by Continental had been accepted for filing.

Q. Mr. Barnett, an examination of the contract dated January 22, 1953 previously filed in this proceeding as Item A, or referred to here as Item A, indicates that it was for a primary term of 10 years from January 31, 1953, and that it would automatically continue in effect after expiration of the primary term for successive periods of one year each provided however that either party

terminate the contract at the end of the primary term or any succeeding annual period, by giving the other party 90 days prior written notice. My question to you is this: Did United have any intention of its canceling the contract at the end of the primary term? A. No, it did not.

Q. Had Continental not canceled that contract at the end of the primary term would United have continued to purchase and receive Johnson Bayou Field gas after January 31, 1963, in accordance with the terms and provisions of the contract dated January 22, 1953? A. Yes, it would have.

Q. Why did United discontinue receipts of Johnson

Bayou Field gas on January 31, 1963?

Mr. Burton: Your Honor, injecting myself, I anticipate the answer to this will get into the need of the gas and the obligation that United does not need the gas. I wanted to enter my objection before the answer this time, that I object to the introduction of any testimony relating to United's alleged need or lack thereof for the gas or the fact alleged that United may have or not have take or pay for obligations accruing under contracts with other producers on the ground such testimony is irrelevant and immaterial to any issue here. This might be of issue in abandonment proceedings if it would be a excuse for United abandoning this sale. But as the Commission has this proceeding it is not material or relevant.

Presiding Examiner: I would not view the order to show cause in such a narrow light as you do. United here asks to show cause why it should not cease the application. But connected with that are the facts surrounding the refusal to take this gas. Now, I am going to overrule your objection.

Mr. Woods: Do you recall the question?
The Witness: Please repeat it.

By Mr. Woods:

Q. Why did United discontinue receipts of Johnson

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Bayou Field gas on January 31, 1963? A. United discontinued receipt of Johnson Bayou Field gas because Continental canceled the contract relating to this sale, demanding a higher price for the gas than United was willing to pay and unilaterally filed a higher price with the Power Commission when it could not obtain United's voluntary agreement thereto, and because United did not need deliveries of Johnson Bayou Field gas in order then to supply its customers.

Q. Is it a fact United is currently in South Louisiana paying for large quantities of gas that it cannot presently take into its system under take or pay for obligations contained in contracts with producers?

Mr. Burton: Your Honor, may my objection be a continuing one to this line of need for and take or pay?

Presiding Examiner: Yes.

The Witness: We have as of the end of 1963 paid out some 15 million dollars in take or pay for gas and we——

Presiding Examiner: Since what date?

The Witness: As of the end of 1963, that is an accumulation of about two and a half years. We have our fingers crossed that we are going to make it up, we hope we don't have to write it off. We may have to if relief cannot be obtained.

By Mr. Woods:

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Q. Mr. Barnett, what does take or pay for mean? A. It means our contractual obligation is such if we don't take

a certain quantity of gas we have to pay for it. We have a right to make this gas up in limited and varying periods of time depending on the contract.

Q. Where is the Johnson Bayou Field located? A. It is located in Cameron Parish in southwest Louisiana.

Q. When United undertook the purchase of Johnson Bayou Field gas in 1953 what facilities did it find necessary to construct in order to receive the delivery thereof? A. The Johnson Bayou Field is located near United's 16 inch transmission line which extends westward from the area of Mud Lake Field in southwest Lousiana and to the Beaumont, Texas, area. This line was already in place when we made our contract with Continental and Continental agreed to deliver the gas produced in that field to a central point located adjacent to United's 16 inch transmission line. In order to make the gas so receivable suitable for efficient pipeline transmission to meter it and to receive it into the Mud Lake line United constructed a separator, a meter station and 55 feet of four-inch line which it joined into its Mud Lake line, all at a total original cost of $6,884.68.

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Q. Mr. Barnett, where is gas sold which is delivered through the Mud Lake line? A. It is sold in the vicinity of Beaumont, Texas.

Q. Who purchases this gas from United Gas Pipeline Company? A. United sells some of it to distributors for resale and some of it directly to industries for their own use.

Q. When United discontinued receipts of Johnson Bayou Field gas on January 31, 1963, did it as a result thereof either terminate or curtail deliveries of gas to give its customers? A. No, it did not. United has continued to serve its customers' requirements since that time without

any interruptions attributal to discontinuance of receipt of Johnson Bayou Field gas.

Q. You previously described the facilities United constructed in 1953 in order to receive deliveries of Johnson Bayou Field gas into its then existing Mud Lake line. Has United removed those facilities? A. No, those facilities remain in place and could be used at any time.

Q. Turning to another aspect, Mr. Barnett, is United faced with competition from other suppliers, particularly producers, for markets in the Gulf Coast area?

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Mr. Burton: Objection. I object to any testimony as to the competitive situation of United with other producers or its markets with other producers, as immaterial and irrelevant.

Presiding Examiner: Objection overruled.

The Witness: Yes. For various reasons, including avoidance of Federal regulation, many of those with available gas supplied in Texas and Louisiana have been aggressively seeking intrastate outlets through which to market their gas. I know as a fact that Texas and Louisiana do not regulate producer prices and sales are made locally in those states by producers and transmission companies without certificates issued by those states. United has lost very substantial markets in Texas and Louisiana to such competition and the prospects exist that this competition will become even more severe in the future.

Q. Does United face other competition for markets? A. Yes, sir, both coal and fuel oil compete with natural gas for markets, particularly industrial markets in the Gulf Coast area.

Presiding Examiner: You mean you are losing business to coal in the Gulf Coast area?

The Witness: In the Mobile-Pensacola area of the territory we serve, yes.

By Mr. Woods:

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Q. Does United object to competition? A. Not so long as it has the power it has always assumed it had of its deciding what costs it will incur. Obviously United is vitally concerned with maintaining its market and making a reasonable return. Enjoying no "exclusive service area" and daily faced with active and strenuous competition from other suppliers of natural gas and from fuel oil and coal, United can maintain its markets and earn a reasonable return only if it can successfully compete. United will not be able to compete successfully if it can be forced to buy gas it does not currently need and to pay higher prices than it is willing to agree to.

Q. Does United have other gas purchase contracts which expire by their terms or which can be canceled? A. Yes. United purchases all the gas it handles through the medium of gas purchase contracts and all those contracts with but a few exceptions expire by their terms at a fixed date in the future, or can be canceled upon expiration of the primary term.

Mr. Woods: In connection with this witness' testimony, Mr. Examiner, I ask there be received in evidence Items A through G, by reference to the Commission's files.

Mr. Burton: I object to the receipt in evidence of Item C, which is the letter dated December 17, 1962, if that is introduced for the purpose of proving the fact of the

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self-serving statement therein that United does not need the gas because the gas supply under contract to United is adequate to supply present market requirements. Other

than that, I do not object to the introduction of the letter, showing that it was written.

Presiding Examiner: Any other objection?

Your objection to Item C is overruled, and Items A through G, inclusive, will be received in evidence.

(The documents heretofore identified as Items A thru G, inclusive, were received in evidence by reference.)

Mr. Woods: That completes United Gas Pipeline Company's direct presentation as a response to the show cause order issued by the Commission herein. Mr. Barnett is tendered for cross-examination.

Presiding Examiner: You may cross.

Cross-examination

By Mr. Burton:

Q. You testified on January 18, 1963, United filed a formal complaint to the action of Continental in filing a unilateral rate increase, and that this was followed by the Commission's order of January 25, making effective without suspension Continental's rate. Is that correct? A. Yes.

Q. Did United subsequently file an application for a rehearing, I believe dated February 21, 1963, rehearing of

the Commission letter order making effective this unilateral rate of Continental's? A. Yes.

Q. Was this on—was this application for rehearing subsequently denied by the Federal Power Commission? A. Yes, sir.

Q. This was denied by Commission order dated March 18, 1963, would that be correct? A. Yes, sir.

Q. Has United since that time not filed a petition for review in any of the United States Courts of Appeal seeking review of this order denying rehearing? A. We have not filed any.

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Q. You have testified concerning United's need for gas. Has United since November 1, 1962, which was about the beginning time of the correspondence referred to in your testimony dealing with possible renegotiations of the United-Continental contract—has United since that time made any contracts for new purchases of gas in South Louisiana? A. Yes. We have made a few. We have limited them to one-well deal where a producer was about to lose a lease or where he was in a very extensive drainage situation. We have really tried to not buy gas in South Louisiana due to our present situation. We have had minor exceptions where we felt like because the producer —our relationship with the

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producer, and his own producing problems, that we had to buy some gas. But we have kept it to a bare minimum and limited to just one well at a time.

Q. All these have been substantially small reserves? A. Yes, just one well.

Q. Would you say smaller than, say, the six billion cubic feet—— A. I would say in the range of the Johnson Bayou field gas or smaller. Some are smaller, none would be larger.

Q. Would one of these contracts be with—a contract dated November 29, 1962, with Tidewater Oil Company, reflected as Tidewater's Rate Schedule 122, covering a sale from Southwest Kinder field, Allen Parish, Louisiana? A. Yes.

Q. Is that contract as reflected by the rate schedule filing by Tidewater for approximate deliveries of 24,800 Mcf per month? A. Yes. Let me tell you about that contract.

We had a take-or-pay-for contract with Tidewater in the Hollywood Field. The reserve came up for rede-

termination, we had to redetermine it, we increased our take or pay, in the situation in the Hollywood Field, which is in South Louisiana. Tidewater said these one-well in the Southwest Kinder Field, they were having lease trouble, would we take it. We have done a lot of business with Tidewater, we

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explained to them our take-or-pay situation, and they came up with the idea that we will take off one million a day in the Hollywood Field and you in effect take that out of South Kinder.

By making this contract we have not increased our obligation in South Louisiana, but have shifted gas from one field to another to accommodate Tidewater's lease problem.

Q. And accommodated your own alleged take-or-pay situation, in effect. A. I have not changed it any.

Q. I thought you said by this you reduced take-or-pay obligations from Tidewater in another field. A. But picked it up in Southwest Kinder.

Q. Is this contract with United to which I referred in the Southwest Kinder Field, their Rate Schedule 122, one providing for ratable take? A. I would think so, yes.

Q. That contract does not provide for take-or-pay obligation, isn't that right? A. I told Tidewater what I am going to take and Tidewater said they would rely on that. I have an obligation to buy a million a day from Tidewater. That is just an understanding. I said I wasn't going to make more minimums and Tidewater said can you indicate to us—they said your word is good, and——

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Q. How long has United done business with Continental? A. Forty years. We have worked some deals with Con-

tinental, we have signed contracts, some we couldn't. When we couldn't make a contract, we couldn't, and no one got upset. We have been making contracts with them for a long time.

Q. Is this contract with Tidewater in the Southwest Kinder Field for a 20-year term at initial price of 18 cents plus 1.75 cents tax reimbursement? A. I would think so. I don't recall exactly.

Presiding Examiner: How much did you say that price was?

Mr. Burton: Eighteen plus 1.75 tax is the initial price.

By Mr. Burton:

Q. Has United also made a contract with Tidewater dated November 29, 1962, in the St. Martinville Field, St. Martin Parish, filed as Tidewater Rate Schedule 123? A. Yes, under the same condition, part of the same two field, and we made two separate contracts, one on each field.

Q. Did they both accommodate a take-or-pay situation? A. No. It doesn't increase our take-or-pay obligation, or decrease it.

Q. Was this contract in the St. Martinville Field also for a ratable take? A. Yes.

Q. Was that at 17.5 cents plus 1.75 cents tax reimbursement, initial price, a 20-year contract? A. Yes, the same price we were paying in the Hollywood Field, I think, so we have just moved it from one field to another, to get some of these leases produced.

Q. Would that contract be approximately for the delivery volumes shown by Tidewater's Rate Schedule filing No. 123, of 6200 Mcf per month? A. I would say so, yes.

Q. Did United make a contract with Wacker Oil Com-

pany in the Donner Field, Terrebonne Parish, Louisiana, dated March 25, 1963, ten-year contract? Is that an 18-cents initial price with no tax reimbursement? A. Yes.

Q. Filed in connection with Wacker's application for a certificate at CI63-1389? A. Yes. In this case Wacker had a very small amount of oil well gas they were flaring in a field where we were taking gas, and as an accommodation to Wacker to put out the flare in a field where we were already taking flare gas from other producers we said we would take their gas. This was an example, that we have seriously held our purchases in South Louisiana for the last two years to an absolute minimum but we cannot, being a pipeline company, with the associations we have, we cannot in some cases refuse to buy

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gas where the man will lose his lease otherwise, or where something comes up and he needs help. But it is of our own wish that we do it.

Q. You would expect, however, that in managing United's gas supply situations you would from time to time over any year contract for new supplies of gas? A. Depending on the situation. I can't say we are not going to buy any more gas. I assure you it is going to be an absolute minimum and none if I can keep from it.

Q. You spoke of a $15 million accumulated take-or-pay obligation. Has this been paid to producers for gas not taken out? A. Yes.

Q. Over how long a period does this represent an accumulated take or pay? A. I believe I said about two and a half years.

Q. It would run back to 1960, sometimes, then? A. Yes, towards the end of 1960 when we first felt it.

Q. What are the makeup periods under the contracts under which this take or pay—— A. That is part of the

problem. We have gone to the producers and asked for extensions of makeup periods to not less than five years. Sometimes we have gotten extensions, we had to do some things we didn't want to do to get them. We have allowed producers to build a gasoline plant on our

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line, that we don't like, but we did so, and so got an extension of our makeup for that.

We have a payment coming up in June this year, our first one, where a producer has refused to give us a makeup, and we will write off our books in some manner around July 1, some $490,000.

Q. This is something you have already paid? A. Yes, in the makeup—the makeup period will have expired. It will expire sometime in July. We are trying hard to get a makeup, an additional extension of time. The producer has told us as far as he is concerned unless we raise the price he won't give us an extension of makeup. We have gotten caught between the devil and the deep blue. If we raise the price it may be for nothing, we still may not get the makeup.

Q. You are asking the producer to give the makeup for nothing? A. We would like him to give it to us for nothing. We can't afford to pay double for it.

Q. But you mentioned you have previously negotiated for instance in connection with a plant, negotiated and given other considerations to producers. A. That is right. In this case we have run out of considerations and don't know what to do.

Q. Would that plant be the Terrebonne Plant? A. Yes.

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Q. There are a considerable number of producers involved on United's system? A. Quite a few. We had

ten or twelve contracts, big contracts, on which we got a five-year makeup.

Q. Effective—— A. It is five years, effective from 1960, and I don't know if I am going to make it up at the end of 1965. That is why I quit buying gas.

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Q. Also, has not United had various settlements that have been approved by the Commission which have included as part of the consideration of settlements extension of make-up periods? A. Yes. In the settlements. And we have worked in the settlements ourselves—gotten make-up periods from the settlements, in conjunction with other considerations.

Q. These are typically four-year extensions? A. Yes, none longer. We have worked on the side with some producers five-year make-up.

Q. On the side? You mean none are any less than four years, and some have been five? A. In the settlements, yes. But we have still some contracts with two-year make-ups in them, beginning to come up.

Q. That have not been renegotiated? A. That is right.

Q. How much money has United lost so far that, as of this time, is past any make-up period? A. The first will be in July.

Q. United hasn't yet lost any of this 15 million? A. No, but I have not made any of it up, either. I don't—don't mislead me on losing it. We don't know how we will account for it or what is going to happen to it. I don't want to misrepresent what is going to happen when

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the period comes to write it off. We don't know how to handle it, really. That is why we are trying so hard to try to make it up, get an extension, hold our purchases to

an absolute minimum, so we can work ourselves out of this situation we are in.

Q. When you entered into contracts with take-or-pay provisions didn't you anticipate at that time some of them might from time to time come due? A. No. We wouldn't have made them if we had.

Q. You didn't make any contract with a take-or-pay provision that you thought you wouldn't perhaps be burdened with later? A. No—if we had known or could have foreseen, or the industry could have foreseen what was going to happen, where we made a contract in a field that had a very small amount of reserve, we didn't have a top on the reserve, and the producer developed the field, and it has grown tenfold, we have in effect found ourselves where the fields were developed at a much faster rate than our sales or market has developed and therefore we find ourselves caught in the middle.

Q. Do you have any reason to think this is a permanent situation? A. No, I don't. That is why we are trying to get an extension of time. We think in a period of maybe five or

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six years we can work and the industry itself can work itself out of this situation. But I have to quit buying gas to do it.

Q. You think if there is an oversupply situation in the industry today, which I only assume from your testimony, for the sake of the question, you think that this situation is temporary? A. I think it is a temporary siutation that the industry itself is going to work out of. But we need time and patience.

Q. You think, say, within five years, that this situation could change dramatically perhaps the other way? A. I don't think it will be a dramatic change. I think it will be a gradual change, and over a period of time we will

work out of it and get into a little better balance than we are in now maybe. It is a problem of the industry. If we were all as a matter of fact informed ten years ago we may have made our plans differently.

Q. Is it correct United has a substantial number of contracts which provide only ratable take, without definite take-or-pay obligations? A. Yes, quite a few. We have in fact—we had a lot of them. We thought what we did 15 or 20 years ago and as late as 5 years ago—we felt like we didn't like these minimums, don't misunderstand me. There has to be some

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indication of take, we know. But the minimum has gotten into this situation. We felt a producer was first entitled to a market, and secondly the producer himself if the market went up sold more, if the market went down the producer sold less.

We have operated that way on these simple ratable take contracts without a contract minimum in there. We do feel like that we have an obligation on these ratable take contracts to take a reasonable amount of gas, and that is what we have tried to do, without an absolute minimum. It worked to the advantage of the producer and pipeline company. The producer could get an outlet for his gas any time, and the pipeline company wasn't strapped with the minimum like we are today.

The minimum situation came into being when the long lines to the East started in about 1945 to 1950, and that has now become a common practice in the industry. We still feel like that a producer is entitled to an outlet, he is entitled though to participate in our market, if the market is good our take is good, if the market is bad our take is bad.

Q. This gives a producer no assurance of any take from a field, though? A. Exactly. That is what the producer

objected to, it didn't give him any figure, but you can't say we have not taken a reasonable amount of gas from Johnson Bayou field

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under this contract.

Q. That contract under Continental's rate schedule has never been based on a minimum take? A. That is right. And they have sold a lot of gas on a ratable take within the field. We have been taking one to one and a half million a day, which is a pretty good take from a six billion reserve.

Q. This compares with the 200 a day under one of these recent contracts you have made? Your St. Martinsville contract with Tidewater, which you agreed was approximately 6200 Mcf per month, and that—— A. I wouldn't say there is any relationship between this field, this Tidewater contract and the contract we have with Continental in Johnson Bayou, no relation at all.

Q. Has United taken the Johnson Bayou gas reserves estimated total recoverable reserves into account in filings for certificate applications and Form 2 reporting submitted to the Federal Power Commission? A. In the past we did of course because we had a contract. We won't include it in the future.

Q. Your contract was for ten years and your facilities did take total recoverable reserves? A. As of a certain period.

Q. Remaining recoverable reserves from a certain period forward to depletion of the field?

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A. That is correct.

Q. What are the reserves in this Johnson Bayou field? A. The Johnson Bayou field is, I would say, in the range

of four to six billion remaining. It is a small field. It is a one-well field.

Mr. Burton: May I correct you, Mr. Barnett? There are two wells.

The Witness: I thought we were only buying gas from one well, that I wouldn't hook the other one up. We buy at a common point through a meter station and pay Continental 100 percent, so there was really no need for us to go behind that point.

Presiding Examiner: What price are you paying Continental for this gas? What were you paying at the time you terminated the contract.

The Witness: We were paying them nine cents plus one and a half cents tax reimbursement, or a total of ten and a half, in that range.

Presiding Examiner: At what pressure?

The Witness: 15.025.

Presiding Examiner: Thank you.

By Mr. Burton:

Q. This gas goes into the Beaumont area, you said? A. Yes.

Q. Is there not a connecting line from Beaumont up

to your 30-inch line near Livingston? A. No, that doesn't connect with the 30-inch line.

Q. But they both go into Beaumont? A. Not the 30-inch.

Q. No, but there is a line I think 18 inches perhaps. A. Yes, an 18-inch line that comes from Goodrich, and Goodrich is north of Houston, and the line comes in a southeasterly direction from Goodrich to Beaumont. So in effect the Beaumont area is served by that line plus this line from Mud Lake, plus an intrastate line that comes from South Texas.

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Q. The 30-inch line is one of your main lines that goes up from the Texas Gulf Coast into Louisiana and the northeast? A. No, this is another line. The 30-inch intrastate line originates in South Texas and comes to Houston, then we have 20-inch line from there to Beaumont.

Q. I mean the 30-inch line at Goodrich. A. It goes from South Texas to Monroe, Louisiana, but has no connection with any line going to Beaumont.

Q. There is not a connection from the Goodrich line to the Beaumont area? A. No, there is not. There is not.

Mr. Burton: Your Honor, may I have incorporated by reference, because I don't have enough copies of it available here, I will make copies if the parties want them, the principal natural gas pipelines in the United States and

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communities served with natural, manufactured and mixed gas, which is printed by the Federal Power Commission, dated 1960, the large pipeline map, and I think that is the last one, I don't think the '62 one is yet available in the large size.

Presiding Examiner: What was the date of that?

Mr. Burton: 1960. I would like to have that identified as Item H, I think it is, by reference.

Presiding Examiner: Very well.

The large map then put out by the Commission under date of 1960 will be marked Item H by reference.

(The document referred to was marked as Item H, by reference, for identification.)

By Mr. Burton:

Q. Mr. Barnett, if I may direct your attention to this map of the pipeline systems published by the Commission, is your system on this line—this map, marked with the

numbers 9020, in red, I believe? A. I won't argue with you, but I—you have a very sorry map to do what you are trying to do.

Q. I just don't have a better one.

Presiding Examiner: We might all agree on this.

By Mr. Burton:

Q. Would you recognize this as the Mud Lake line, referring to a line marked 16 inches and extending from the very southwest part of Louisiana right near the Coast, and

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just a distance that looks perhaps fifty miles or so east of the Sabine River and Sabine Pass area appearing to run across under the Bay area around the outlet of the Sabine River into the Port Arthur and up to the Beaumont area—— A. That is the Mud Lake area into which Johnson Bayou field is connected.

Q. There appears to be a continuation from Beaumont up to Goodrich marked 18 inches. A. Here is where you are wrong. Our market is located in the Port Arthur-Beaumont area, we feed gas from Goodrich into that area, feed gas from Mud Lake west into that area, but there is no connection between the Mud Lake line and the line from Goodrich.

Q. But there is a connection from the 30-inch line, off the 30-inch line? A. No, it doesn't tie into the 30-inch line. That is what I am saying. That is not a connection, that is a compressor station. But there is no connection between the 30-inch line to Monroe and the 18-inch line going from Goodrich to Beaumont.

Q. They come together in the near vicinity of Goodrich, at a compressor station? A. They cross in that area.

Presiding Examiner: You mean all the gas flows in the Beaumont area from the Johnson Bayou field?

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The Witness: All the Johnson Bayou field flows to and is used in the Beaumont area.

Presiding Examiner: Where does the gas flow in the 14-inch line into the Beaumont area?

The Witness: It flows south, and we are only carrying a very minute amount of gas in that. This is a 35-year-old line coming down from East Texas, but it is kind of a—we have some little towns along that line and are flowing south from the East Texas area down that line into Beaumont.

In other words, Beaumont is served by three lines—four lines, first by the line from Mud Lake, which moves—it can move around 100 to 150 million a day to it, through it; secondly, it is served by a 14-inch and 16-inch line coming south from Magasco in East Texas, and we bring down probably 2 to 3 million a day through that line, and the third line is a line extending from Goodrich, 18-inch line, extending from Goodrich southeasterly in direction into Beaumont, and we probably, I am not quite sure on this figure, we are probably bringing maybe 25 to 30 million a day through that line; and the fourth line is an intrastate line which flows from South Texas to Houston, then with a 20-inch extension into Beaumont where all gas bought on that line is nonjurisdictional.

By Mr. Burton:

Q. You have quite a pipeline system into the Beaumont

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area at this time, in other words? A. It has been accumulated over 35 years, that is correct.

Q. And you have quite a market area in that area, is that correct? A. It has been a good market area, that is why we have all these lines in there.

Q. This is one of the large industrial complexes, the Port Arthur-Beaumont, Texas, and the Houston area? A. That whole area, Houston to Beaumont, is what we have been serving, plus the towns in the area.

Q. Isn't it true through your affiliate United Gas Corporation you are one of the major local gas distributors in Houston, itself, is that not true? A. We have a parent company, United Gas Corporation, which is a distribution company, that distributes gas to the burner tip.

Q. I misphrased perhaps—it is your parent company, rather than your affiliate, and—— A. We sell to other city gate customers just like we do to United Gas Corporation and they distribute to some of the little towns in that area, and big towns, too.

Presiding Examiner: Mr. Burton, would it be a convenient time for our recess?

Mr. Burton: Yes, Your Honor.

Presiding Examiner: Very well. We will take a ten-minute recess.

(Whereupon, at 11:25 o'clock a.m., a recess was taken until 11:35 o'clock a.m.)

Presiding Examiner: The hearing will be in order.

By Mr. Burton:

Q. From my search, apparently the 1961 and 1962 Form 2 reports of United do not break out separately Johnson Bayou Field purchases so they can be identified by field, but for 1960 I have the figure shown by United's filing on Form 2 with respect to Johnson Bayou, which would represent Continental's reserve there of 6,614,000 Mcf reserves at the end of the year. Would that be about right? A. That was in 1960?

Q. Yes. A. Yes, it is in the range of four to six billion in that type of field.

Q. I am referring here only to the figure that was filed. There might be some modification of that, perhaps.

Mr. Woods: The witness is speaking of cubic feet, and Mr. Burton is speaking of——

The Witness: I am speaking of a comparable figure to that Mr. Burton is speaking of.

By Mr. Burton:

Q. I am speaking of MMcf, and I think the witness is

speaking of the same range, four to six million Mcf, remaining reserves.

In connection with the Tidewater Oil Company Rate Schedule 122 representing sale from the Southwest Kinder Field and that contract which was dated November 29, 1962, is it correct that that contract provides for delivery at the well? A. Which field do you have reference to?

Q. Southwest Kinder. A. Southwest Kinder while delivery may be at the well, Tidewater is laying—we are laying the line and Tidewater is reimbursing us for half of it. But United Gas Pipeline Company will own the line and buy at a point in the field which is near the well.

Q. And that contract then does provide that United would build the line and Tidewater, the seller, would reimburse for the lessor of $31,000 or 50 percent of the connection costs? A. Yes.

Q. And you have testified I believe that about $6,000 was spent for the facilities that were necessary to connect to the Johnson Bayou gathering line for the Continental sale? A. Yes, that was the facilities that we installed as provided for in the contract. We were obligated to put in the meas-

uring station and we put in the separator as a precautionary measure to protect our pipeline, and put in

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about two joints of pipe to get us a little away from the meter station.

Q. And Continental under that contract when it was made and operations were commenced in 1953, Continental bore the expense of all the gathering facility necessary up to within about 55 feet of your existing line? A. That is correct.

Q. In connection with Johnson Bayou Field, are you familiar with the fact that there are other producers in that field? A. I don't know there were, not that had any gas, except maybe Pan-Am is in there, and we offered them a contract ten years ago when we bought Continental's gas and they refused it, so we feel like whatever obligation we had to Pan-Am was satisfied when they refused our contract. Continental is the only one we have ever purchased gas from, just had one contract, and that was Continental.

Mr. Burton: I would like to have identified as items by reference three items which are the letters and telegrams exchanged between United and Continental, between January 28 and January 31, 1963, dealing with the discontinuance of actual takes. These are attached for everybody's reference as material to Continental's petition for order to show cause.

I would identify the first, I think I is the next letter.

Presiding Examiner: Just a moment.

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That is the letter——

Mr. Burton: Of January 28, 1963, from United Gas Pipeline Company to Continental Oil Company, signed by Mr. Barnett, Vice President for United.

Presiding Examiner: That will be identified as Item I, by reference.

(The document referred to was identified as Item I, by reference.)

Mr. Burton: As Item J, a telegram dated January 30, 1963, to Mr. C. C. Barnett, United Gas Pipeline Company, signed Bruce R. Merrill, Continental Oil Company.

Presiding Examiner: That will be marked Item J.

(The document referred to was identified as Item J, by reference.)

Mr. Burton: Item K, a telegram dated January 31, 1963, to Bruce R. Merrill, Legal Department, Continental Oil Company, signed United Gas Pipeline Company, by C. C. Barnett, Vice President.

Presiding Examiner: That will be marked as Item K, by reference.

(The document referred to was identified as Item K, by reference.)

By Mr. Burton:

Q. I refer you in order to these three items by reference, Mr. Barnett: The first is Item I, the letter of

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January 28, which bears your signature. Is that a correct copy of that letter? A. Yes.

Q. And the second item, J telegram from Mr. Merrill to you, is that a correct copy? A. Yes.

Q. And the third item, Item K, your telegram of January 31 to Mr. Merrill, is that also a correct copy? A. Yes.

Q. Mr. Barnett, has United ever before let go of a reserve of gas by ceasing to take—let me rephrase that question.

Has United ever before ceased to take over a period as long as five months with the evident intention of not taking further at any price specified by the seller, gas under which remaining reserves equal to as much as half of the original recoverable reserves in the field were still available? A. Let me put it this way: We have not taken any gas where we did not have a contract.

Q. You have never taken gas where you did not have a contract? A. Right. We went through this same thing with Continental at Abbeville and St. Martin's, we didn't take that gas either.

Q. Didn't you take that gas under a temporary

restraining order issued by the United States District Court for the Western District of Louisiana, and subsequently under an injunction pending appeal issued by the United States Court of Appeals for the Fifth Circuit of Louisiana from the time of termination of the contract until this Commission several months later permitted abandonment in accordance with Continental's application? A. I paid the nine-cent price for the gas, not the price Continental——

Mr. Burton: I move to strike as unresponsive.

Mr. Woods: Then I will object to the question. I have no objection to the full facts coming out, though I can't imagine what relevance this has, something that occurred two years ago.

Mr. Burton: I didn't bring in the two years.

Presiding Examiner: One at a time.

Mr. Woods: We have been through this with Continenal before, under similar circumstances, and Continental chose to go to the Federal courts and obtained an injunction requiring us to buy the gas, but the court said they couldn't make us buy at a unilaterally imposed rate. It was a draw, in effect. The court said United must buy, but needn't

pay the unilaterally imposed price, United could buy under the terms of the old contract.

If we get these facts into the record, it should be

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done by going to the record in that case and having it here complete.

Continental gained nothing in that proceeding, as we saw it. I don't think it is material to this proceeding, and I don't think it throws any light on this situation that will help the Examiner. Purely for that reason I object. If the Examiner is interested in it at all, I think we ought to bring all the facts forward and lay them on the line. But I object because I don't think it is helpful or material.

Mr. Burton: I would be willing to strike everything back to Mr. Barnett's first remark about it. He brought it up.

Presiding Examiner: I am going to overrule the objection. It may be connected.

(Question and answer read.)

Mr. Burton: I move to strike the partially completed answer as unresponsive. The question calls for a yes or no.

Presiding Examiner: I think the witness can answer yes or no, and please do so. But then if you have an explanation to make, you make it.

The Witness: I think the answer is yes. But I was trying to say we have not had the type of cases come up that you are mentioning that we quit taking gas except with Continental and with Phillips. All of our other producers we have been able to work out a contract with them when the

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contract term was about to expire. So, setting a predicate, this has only come up with Continental, and we had

one case with Phillips where they at that time got their abandonment and we didn't pay the higher rate.

By Mr. Burton:

Q. Both those cases abandonment was sought by the producer? A. As far as I know it was. I was trying to illustrate that those were the only instances where this has come up. The rest of the time we worked out our contract with the producer and the producer did not insist that we do something that wasn't in the contract.

Presiding Examiner: What date did this occur?

The Witness: I would say it was two years ago.

Mr. Burton: August, September, or subsequently, in 1960, Your Honor, and the Commission——

Presiding Examiner: Thank you.

Mr. Burton: I have the file references I could give you.

Presiding Examiner: Thank you.

By Mr. Burton:

Q. Returning to the line of questioning we were at before this excursion, you said United has never taken gas except under contract. But my initial question which got us into this discussion was whether United has ever before

ceased taking gas where it had been taking gas under a contract and at the time of cessation of takes there was as much as half of the original recoverable reserves still remaining available under the leases of the producer.

I think this calls for a yes or no. I would accept any comment or explanation you wish to offer. A. The only cases we have are the two with Continental, and the case with Phillips in the Lewisburg Field.

Q. Abandonments were issued in both these cases? A. As far as I know they were. But we didn't pay the higher rate.

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Q. The question doesn't go to rate. A. I am saying we could work out with the producer when the contracts were about to run out—we have been able to work out a mutually acceptable extension, and the only time we have been faced with this issue is the two times with Continental and the one time with Phillips.

Q. Since you brought up the Continental situation, did the Commission allow to become effective rates, Continental's unilateral rates, in the Abbeyville and St. Martinsville Fields, subject to refund? A. As I recall they did.

Q. So they were effective rates filed with the Commission? A. I don't know the legal aspect. But I didn't pay Continental but nine cents when it was all done.

Q. Were you billed for a deficit, by Continental, of the difference? A. And we returned the bill.

Q. You didn't pay the bill? A. We did not pay the bill.

Q. At the time you were billed Continental was not subject to a certificate to sell to you, Continental had already obtained abandonment at the time you were billed and you returned the bill? A. I don't recall that. I just recall our

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accounting was told definitely not to pay that bill, period.

Q. Continental did not sue you? A. No, they did not.

Q. Assuming there are other producers in the Johnson Bayou Field, Mr. Barnett, who are attached to another pipeline, which I will prove through another witness is Transcontinental Gas Pipeline Corporation, and that these other producers have wells completed into the same formations as Continental's wells in this field, that these other wells are producing offset to Continental, wouldn't you consider that Continental's reserves underlying its lease in Johnson Bayou would be drained? A. They would be drained. But

you canceled the contract, we didn't. You are the one that said, "I wanted to quit", we didn't say that. You are the one that said, "I cancel the contract", you are the ones that submitted yourself to the draining, not me.

Q. Mr. Barnett, recognizing that offset wells by other operators selling to another pipeline would drain Continental's leases, or lease, would you accept the fact that the remaining recoverable reserves under Continental's lease would not indefinitely remain available to United to pick up at a later time by resuming takes through the present facilities, that some of this will be drained away?

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A. If you are being drained and don't produce your wells you will lose your reserve.

Q. And you—we couldn't later produce the reserve and sell it to you? A. That is correct.

Q. It would be gone to us as well as to you? A. That is correct.

Q. And so you cannot count on having a continued reserve in the ground to be there any time you want it? A. Not as far as Johnson Bayou is concerned.

Q. If Continental's lease lapsed for cessation of production after expiration of the primary term and Continental could not maintain the lease by oil production or by shut-in payments, lease forfeiture by Continental would also lose the reserves for your system? A. Yes, if they are going to sit there and lose their lease when we offered to take your gas until you got your abandonment—we made the offer, I don't know what more obligation you expect of us.

Q. Understand we are not applying for abandonment. A. You canceled the contract. Speaking from an operating standpoint, when you cancel a contract, I would think that would be your next step.

Q. One of the letters you identified in evidence this morning advised you we were not seeking abandonment?

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A. That is what I don't understand. You cancel the contract, then you don't want to apply for abandonment. If you didn't want to abandon, why did you cancel the contract?

Mr. Burton: That is all I have of Mr. Barnett, Your Honor. I move to admit in evidence the items by reference H through K.

Presiding Examiner: Any objection to receipt in evidence of Items H through K? Without objection they are received.

(The documents previously identified as Items H through K by reference were received in evidence.)

Mr. Burton: Item H, Your Honor, I offer to make available to anyone here. If anybody wants that pipeline map I will get copies of it today. I have to pick up something else anyway. I think probably we all have it. Then I feel relieved of that offer. Thank you.

Mr. Woods: Mr. Examiner——

Mr. Knight: I have some cross-examination when the time comes, Mr. Examiner.

Mr. Woods: Mr. Examiner, I think somewhere this record should reflect more accurately and more correctly what occurred in this prior litigation between Continental and United before the Federal courts involving the Abbeyville Field. It doesn't seem appropriate to ask this

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witness what the status of the proceedings were and if in fact we bought under a temporary restraining order which was subsequently dissolved, I don't think he is qualified to answer such technical questions. I would like to make

a statement subject to Mr. Burton's reply as to what happened from a legal point of view in that proceeding. The record is not complete, it won't help the Examiner, in its present condition, in my opinion.

Mr. Burton: I have no feeling about bringing it all out. I think it is irrelevant, as I said before, I think. It came up through the witness' answer, which I think was unresponsive to my question. There was a show cause proceeding before this Commission, that might be incorporated by reference. There was a suit for injunction brought in the United States District Court and an appeal therefrom to the Fifth Circuit. There was an appeal from the Commission's order telegram denying show cause order to the Fifth Circuit Court, also, later dismissed by the Court of Appeals subsequent to Continental obtaining abandonment. Rather than the parties making statements and trying to answer each other's statements, might I suggest that certified copies or conformed copies of the pleadings filed in the District Court and Court of Appeals including the two petitions for review, all the pleadings on both sides, and answers, and orders of the courts, be

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put in evidence. I think they would have to be exhibits, because they are not before the Commission. If they could be put in as exhibits by stipulation perhaps we could do it later. We obviously don't have them available today and it would take awhile to collect them. I hate to suggest the idea of another hearing for that purpose alone. If it were only for that perhaps staff counsel could accommodate counsel for the parties.

Presiding Examiner: Maybe that is something you could work out. I think it would be better at this time to just continue with the cross-examination. On redirect Mr. Woods may want to bring out something more. Perhaps you can get together.

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Mr. Burton: Fine. I think a statement would create the same problems as testimony from the witness on this. I would be willing to undertake the burden of supplying copies if the Examiner wants.

Presiding Examiner: At this point as what Mr. Woods wants. Is there any objection to that procedure?

Mr. Woods: I don't think it is necessary. I wanted simply to state in substance what transpired. That was this: Continental undertook in Abbeyville Field to cancel its contract there was at the end of the primary term and it did cancel it. Then it applied to the Federal Power Commission for authority to abandon the sale to

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United. In the interim United discontinued receipt of the Abbeyville field gas at the time of the effective date of the cancellation of the contract. Then Continental went to the United States District Court for the Western District of Louisiana and sought an injunction from that court ordering United to purchase the gas. It obtained from the District Court an injunction which required United to purchase—without injunction, it was a temporary restraining order, to purchase the gas pending hearing on the application for injunction, and the price to be paid by United was the contract price, not the increased price Continental filed for unilaterally with the Federal Power Commission. Subsequently the District Court ruled it had no jurisdiction at the time and vacated the restraining order, and then Continental went to the United States Fifth Court of Appeals and obtained a stay pending appeal. Once again the Court required that United Gas Pipe Line Company continue purchasing Abbeyville Field gas but that United would only have to pay the contract price, not the increased price filed unilaterally. That order was vacated by the Fifth Circuit without ruling on the merits after the Fed-

eral Power Commission allowed Continental to abandon its sale to United at Abbeyville, the point being in effect nothing was decided in that proceeding.

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That is really what I wanted to get out to the Examiner so there would be no mystery about what happened or any thought in the Examiner's mind of some ruling in that proceeding that has effect here to determine the outcome of this controversy.

Mr. Burton: One minor statement: I think Mr. Wood said deliveries ceased. They did not. Because the restraining order became effective just hours before that would have happened. There was never any lapse until abandonment.

The other point is a characterization, and again this is my problem and we can lay it to rest right here for all I am concerned, by saying that the courts there ordered that United pay or put any blessing on the old price, that United had paid. To our reading of those orders the court very clearly, the District Court, on our insistence, recognizing our position, spelled out the fact that the lawfully filed rate was a higher rate, that it was before the Commission, the Commission had jurisdiction over the rate and the court was only trying to preserve a status quo in continuing takes at what had been paid before. And the court washed its hands, both the District Court and the Court of Appeals washed their hands, of a final resolution of the rate issue and they did not hold in any way that the Court was substituting its judgment or legal determination

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that the old contract rate was the effective rate, and it left us open completely to a right to bill and later get the higher rate. As Mr. Barnett testified we did bill and as

he testified on my question they sent back the bill and we just didn't sue them. This is a matter of Continental's management discretion and the true reason, I think United realizes as much as we, was that at the time we didn't want to press United, we have done business for them for 40 years as I think Mr. Barnett said. I would agree with Mr. Woods, the whole thing means nothing. But we get into these troubles if we are going to try to make these statements. That is, agreed statements. If we can just take it as two statements by counsel, that is fine.

Presiding Examiner: Very well.

Cross-examination (Cont'd.)

By Mr. Knight:

Q. I refer to your testimony concerning the facilities constructed by United. You testified as I recall that United constructed a separator, a meter station, and 55 feet of four-inch line which joined its Mud Lake line. Is that correct? A. Yes.

Q. When were those facilities constructed by United? A. When were they what?

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Q. When were they constructed? A. Right after we made the contract. We made the contract in January 1953 and, of course, it was our obligation to have those facilities in as soon thereafter as we could so we started thereafter. It wasn't too much construction so I would say it didn't take us more than two or three or four months to get it on.

Q. Construction was completed by what month? A. I said I don't know. I don't know what the date of first delivery would be.

Q. Was it in 1953? A. Hold it just a minute. The first delivery must have been January 31, 1953, because our

contract ran 10 years from date of first delivery so we had our facilities in by January 31, 1953.

Q. Those facilities were constructed during the month of January 1953? A. Or started probably in 1952 because we had to buy the right-of-way and site and things like that, and it——

Q. Those facilities were constructed for the purpose of enabling United to buy gas from Continental from the Johnson Bayou Field? A. Under the provisions of the contract which we had made with Continental.

Q. Those facilities were constructed for that

that purpose, that is? A. Yes.

Q. The title to those facilities was in and still is in United, is that correct? A. Yes. The contract said Continental would bring the gas up to one point and United pick it up at that point and we were responsible for putting in our facilities at our expense, retain ownership and Continental put in their own facilities at their expense.

Q. Where was the point to which you have just referred in your answer? A. At the end of the 55 feet of four-inch line. Their property came up to the end of that piece of pipe. I mean that is a common practice, I mean that is the only way you can do it, is to agree on a point where both of you bring your facilities to.

Q. Yes. Were any other facilities constructed by United or by anybody else to enable United to purchase the Johnson Bayou gas from Continental? A. What do you mean?

Q. Well, were the facilities which we have enumerated here all the facilities necessary to be constructed in order to enable United to buy Continental's gas from—— A. We had a 16-inch line extending from Beaumont in.

Q. Yes. I am only talking about the facilities that

you had to construct, United had to construct, after entering this contract in 1953 with Continental in order to enable United to take into United's system this Continental gas from the Johnson Bayou Field, no other facilities were necessary to construct?

Mr. Burton: Did staff counsel, speaking of facilities constructed by anybody else—does he include Continental's to which Mr. Barnett testified to already?

Presiding Examiner: No. We will give you another chance at it.

By Mr. Knight:

Q. My question was all-inclusive, Mr. Barnett; it was, and it is. I am talking about the facilities that were constructed after or in anticipation of the contract of January 1953 between Continental and United for the sale by Continental to United of the Johnson Bayou gas. I am talking about facilities constructed for the purpose of making that sale and purchase by United possible. A. What—I mean, I thought I told you about the meter station and the separator——

Q. That is right. I am asking if there were any other facilities besides those constructed for that purpose? A. No, since we already had in the 16-inch line that we connected this into as far as I know unless I

misunderstand that was the only facilities that we installed, United installed.

Q. Yes. When United installed those facilities you had all the facilities that were needed to enable United to purchase the Johnson Bayou Field gas from Continental, is that correct? A. We had a 16 inch line that was moving gas from this same general area into Beaumont. If we

hadn't that we couldn't, of course, have brought this gas in.

Q. You had that before you constructed these facilities? A. Yes.

Q. So after you constructed these facilities, the separator, the meter station and the 55 feet of four-inch line you had all the facilities that were needed together with those that were previously constructed, to enable United to buy the Johnson Bayou gas from Continental, is that correct? A. That is correct, unless I am missing something.

Q. I don't think you are. A. That is correct. That is all we installed.

Q. Continental did not construct any facilities so far as you know in connection with this purchase of gas from Johnson Bayou Field? A. Continental had to lay their own line which they retained

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ownership of from their well to this delivery point. They did not, of course, install any facilities on our line, nor we on theirs.

Q. That is the line to which you referred which Continental laid was a line coming up and that connected with the end of 55 feet of four-inch line United laid? A. And extended from that well, their well, to make a continuous line through which the gas would flow.

Q. Yes.

Presiding Examiner: How far away is the well from the end of your line, approximately. A. I would say around half to three-quarters of a mile and Continental may correct me because as I recall on a map that is about—about a half mile.

Mr. Burton: That is about right.

By Mr. Knight:

Q. With relation to the 55 feet of four-inch line which United constructed where is the separator located? A.

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The separator, if you begin at a point on the 16-inch line you first come to the separator, then you come to your meter station then you come to your four-inch line then you come to Continental's line.

Q. That is your meter station and separator then are located at the junction of the 55 feet of four-inch line and United's Mud Lake Line, is that correct?

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A. Yes. Yes. They are all on the same site. We bought a site for the meter station and all our facilities on just a small site are basically what we call Continental delivering the gas to a point on our 16-inch line.

Q. Yes. Now, referring to the separator, meter station and 55 feet of four-inch line about which we have been talking are those facilities being operated now? A. They are not.

Q. Have they been operated since January 31, 1963, when United ceased to purchase gas from Continental from the Johnson Bayou field? A. They have not.

Q. Were they operated up until that time when United ceased to purchase gas from Continental? A. Yes, sir.

Q. I infer from your answers, Mr. Barnett, that these facilities about which we have been talking were useful and are useful only in connection with the purchase by United of Johnson Bayou gas from Continental. Is that a correct inference? A. Yes.

Q. Turning to another subject, the subject of price, the price at which United was purchasing gas from Continental is that which is set out in United's FPC Gas Rate Schedule No. 115, is it not?

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Mr. Burton: Continental's?

Mr. Knight: Continental's FPC Gas Rate Schedule 115, I mean, thank you.

The Witness: I am not sure of Continental's number. I am not sure.

By Mr. Knight:

Q. I see. Yes. In response to a question from the Examiner you made a statement regarding the price which United was paying at the time of the cessation of deliveries, cessation of purchases by United. As I recall, in your answer you were not making an exact statement but approximate statement of the price. So I will ask you whether the price which United was paying Continental for that Johnson Bayou Gas was 10.797 cents per Mcf at 15.65 psia which price included a 1.8 cent tax reimbursement. A. Well, we have introduced the contract here. The contract price is 8.9970 cents plus 1.8 cents per Mcf tax reimbursement all at 15.025 psia which is the State of Louisiana standard pressure base.

Q. 15.025 psia? A. Yes.

Q. Thank you.

Mr. Knight: That concludes my cross-examination, Mr. Examiner.

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Presiding Examiner: Is there any other cross-examination?

I have a question, Mr. Barnett.

United's pipeline system is an integrated system, is it not?

The Witness: Our system is rather inter-connected. It is not what you would term an integrated system.

Presiding Examiner: It moves gas from one place to another?

The Witness: Within limitations depending on the pressures and the pipeline size.

Presiding Examiner: Certainly. You have rather a shortage of gas in your Monroe area, haven't you?

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The Witness: Well, we have had a shortage of gas in Monroe for a long time, due primarily that we didn't have enough pipeline capacity up there. We have during the last about a year ago laid a new 30-inch line from south Louisiana to Monroe to reinforce the reserves in the Monroe area, which are declining quite rapidly because they are old fields. There has been no major discoveries of natural gas reserve in north Louisiana.

Presiding Examiner: Is that pipeline in operation now?

The Witness: Yes, the pipeline has been in operation about a year and three months.

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Presiding Examiner: Moving gas into that area?

The Witness: It is moving gas from south Louisiana into the Monroe area.

Presiding Examiner: Yes.

The Witness: We supply, if I may add one thing, we supply Monroe area from a 30-inch line beginning in south Texas to Monroe and from a 30-inch line beginning in south Louisiana to Monroe plus local production in the north Louisiana area. They are the three sources of supply for the Monroe area.

Presiding Examiner: Is this take or pay for position that you have, is that just local to this southwest Louisiana area, or is it all over your system?

The Witness: It is local to the southwest Louisiana area, brought about primarily because the south Louisiana area has been the latest big area to develop. In other words, it did not begin to come in, I mean the potential wasn't realized, the amount, large amount, of reserve, until 1950, or 1954, and as a consequence all the pipeline companies going into that area went in with take or pay contracts, reserve type contracts, and we did, too. But the other areas of our system, we don't have the take or pay

contracts. We don't have them in the Monroe area, nor in Jackson, only to a minor degree in Texas. We have other types of take contracts similar in effect to

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the one we had in Johnson Bayou where it was a simple ratable take contract.

Presiding Examiner: Why don't you take this gas from Johnson Bayou and cut back on your deliveries on other parts of your system?

The Witness: What part of the system do you want me to cut back on?

Presiding Examiner: I am asking you, can you do that?

The Witness: We could take Johnson Bayou gas and cut back on other fields, oh, yes.

Presiding Examiner: What other parts of your system, other than southwest Louisiana? What other parts?

The Witness: I would probably have to cut back on Mud Lake, which is prime source of supply for that line.

Presiding Examiner: Can't you shift gas around in your system?

The Witness: To a limited degree.

Presiding Examiner: Did you say you are moving some gas out of the Monroe field, south?

The Witness: Only a minor amount of gas out of the extension area, south, but not any out of Monroe field.

Presiding Examiner: And, by the way, in this southwest Texas area, does the company have any price policy for these new purchases that you are mentioning?

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The Witness: In what area?

Presiding Examiner: Southwest Louisiana.

The Witness: No, Sir. We have no set policy. We have never had a set policy on price. We—and that is why we have a price differential in our contract. It really

depends on the situation that existed at the time you made your contract.

Presiding Examiner: I was under the impression that maybe it was the price in this contract that made you agreeable to the cancelation.

The Witness: Not so much price as the unilateral effect of the filing, plus the fact Continental cancelled the contract, plus the fact I think I can buy gas cheaper than this price Continental has fixed in their unilateral filing.

Presiding Examiner: Can you buy it as cheap as this nine cent or ten cent gas?

The Witness: No, sir, I cannot buy it that cheap.

Presiding Examiner: Have you at this time pending any other large certificate proceedings to construct new facilities to furnish your other suppliers?

The Witness: Yes. We have pending a certificate proceeding to put some compressors on this new line, 30inch line, to Monroe.

Presiding Examiner: Yes.

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The Witness: From south Louisiana.

Presiding Examiner: Will you buy any additional gas for this certificate?

The Witness: No, sir, I am trying to use up the gas I have already bought.

Presiding Examiner: I believe we can shorten this. I am under the impression that you testified that the gas moving from this Johnson Bayou Field moved in interstate commerce, and it was for resale.

The Witness: It moves from Texas into—it moved from Louisiana into Texas.

Presiding Examiner: Into Texas, for resale?

The Witness: Part of it is sold on resale basis to the city gates, part of it is sold directly to industrial customers.

Presiding Examiner: Thank you.

Redirect?

Mr. Burton: I have some further cross-examination, Your Honor, in view of something developed from your questioning.

Cross-Examination (Cont'd)

By Mr. Burton:

Q. This gas, all of it is transported in interstate commerce, referring to your answer to that last question? A. Yes. All of it would go from Louisiana into

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Texas, there is no market between the field and Beaumont, the Texas border.

Q. And other gas from other producers in other fields is also taken in this 16-inch Mud Lake line? A. We have one other contract, a big contract with Magnolia, in Mud Lake, that is the prime source of supply for the Beaumont area. It is on the range of 50 million a day.

Q. These two purchases are commingled in the Mud Lake line? A. Yes.

Q. Where they cross the border, and being carried into the market area the Beaumont area? A. That is correct.

Q. Did I understand you to say your take or pay situation is local to Southwest Louisiana in response to the Examiner? A. Yes.

Q. Is this $15 million accrued under contracts only involved in southwest Louisiana? A. I am thinking of the whole of south Louisiana.

Q. Local to the State of Louisiana within part designated as "south" by the Commission in policy statements? A. In the rough range of total south Louisiana. It

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is not limited to the southwest.

Q. Not limited to Johnson Bayou Field? A. Oh, no; clear across the southern part of Louisiana.

Q. You said Continental's contract and rate schedule has never presented a take or pay situation, it is not one under which take or pay would accrue? A. Oh, no, it is not.

Q. Dosen't United have contracts with take or pay situations in Mississippi, a considerable number of them? A. Yes. We have contracts in one field in Mississippi. But so far we have been able to, because of the location of that field, take the amount of gas that we are obligated to take and have not made any deficiency payment.

Q. What one field? A. Maxie-Pistol Ridge.

Q. Would that contract be for purchase from CF&H Oil Company? A. Oh, we have about 150 contracts.

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Q. In this field? A. Yes. We have contracts on a very extensive—very extensive number of contracts.

Q. Is this a large field area? A. Quite large geographically, yes.

Q. Would this be sometimes referred to as Pistol Ridge, Maxie and Forest, Lamarr and Pearl River area, all about same? A. Yes, sir.

Mr. Burton: I won't burden the record with identifying these contracts or putting them in evidence through a witness since Mr. Barnett says there are perhaps 150 producers. I would certainly point out there are contracts outside of Mississippi.

By Mr. Burton:

Q. You have no take or pay situation in Texas? A. We have take or pay contracts in about three fields and we

are buying from some 200 fields. So far we have not had any take or pay. Those fields are declining and we have been able to maintain our take sufficiently to offset. Our decline in the fields—I cut back as decline comes in.

Q. A large amount of the gas that comes into the Beaumont market area comes from purchases in Texas, does it not? A. Yes.

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Q. And then these are with the relatively smaller number of exceptions ratable take contracts having no take-or-pay obligations in Texas? A. They are contracts that in effect say we will take our market and allocate it on some basis, if the market goes down the take goes down, not a take-or-pay contract as we think of it in the industry normally.

Q. You have an active market in Beaumont now? A. Yes.

Q. If you took the Johnson Bayou gas and continued to take gas from the other producers, particularly those in Texas from whom purchases are made under contracts and which part of the supply that goes into the Beaumont area through your various contracts, if you took ratably from Continental and also from these other producers, particularly the Texas ones, no one producer would cause you any take-or-pay problem that would be noticeable? A. I could have trouble with Magnolia at Mud Lake. That contract was made about twelve years ago, and it is a contract that says I will take 00 not take or pay, but I will take 50 million a day as long as they have 100 million a day available, so I have a fixed obligation to take at least 50 million a day from Magnolia at Mud Lake.

Q. You have had this contract in operation for some time?

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A. Twelve years.

Q. And you have been taking for twelve years under this contract, the last ten years of which were concurrent with your takes from Continental at Johnson Bayou? A. Yes.

Q. And both these go into the same Mud Lake system, these are the two commingled purchases taken in Louisiana into your Mud Lake line? A. Yes.

Q. Thank you.

Mr. Burton: That is all I have, Your Honor.

Mr. Knight: May I ask a question, Your Honor?

By Mr. Knight:

Q. At what point did title to the Johnson Bayou gas pass from Continental to United? A. At the point where Continental facilities tie in with United's system.

Q. That is, Continental's pipeline from the well to United's 6-inch pipeline, 55 feet? A. The 4-inch pipeline. Yes, it would be at that point.

Q. At that junction title passed? A. Yes, sir.

Q. Thank you.

Presiding Examiner: Gentlemen, I note it is past our

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recess. We will stand in recess until two o'clock.

(Whereupon, at 12:45 p.m., the hearing was recessed, to reconvene at 2:00 p.m., the same day.)

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AFTERNOON SESSION

Presiding Examiner: The hearing will be in order.

Whereupon,

C. C. Barnett

resumed the stand and testified further as follows:

Mr. Burton: We have no further cross-examination.

Presiding Examiner: Redirect?

Mr. Woods: United has no redirect, Your Honor.

Presiding Examiner: Does anybody else have any questions of the witness?

You are excused.

(Witness excused.)

Mr. Burton: Continental would call Mr. Rosser as a witness, Your Honor.

Whereupon,

W. H. Rosser

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Mr. Burton: I would like to have two exhibits marked, the first a field map and estimated reserves of Continental Oil Company, Johnson Bayou Field, Cameron Parish, Louisiana.

Presiding Examiner: That will be marked for identication Exhibit 1.

(The document referred to was marked as Exhibit No. 1

for identification.)

Mr. Burton: The second consists of nine pages, the first three of which are an assignment, the fourth a resolution, and the following three pages are headed "Oil, Gas and Mineral Lease," and the last two pages are a second resolution. These are the lease, and amendment thereto, of Continental, from the Cameron Parish School Board.

Presiding Examiner: It will be marked Exhibit No. 2 for identification.

(The document referred to was marked as Exhibit No. 2 for identification.)

DIRECT EXAMINATION

By Mr. Burton:

Q. Please state your name, address and position. A. My name is W. H. Rosser and I reside in Houston, Texas. I am employed by Continental Oil Company as engineering coordinator, Production Department.

Q. Please state briefly your education and experience qualifications. A. I graduated from the University of Texas with a B.S. degree in Petroleum Production Engineering in January, 1939. From March, 1939, to March, 1940, I was employed by Housh and Thompson Drilling Company, drilling contractor and independent oil producer with headquarters in Houston, Texas. I was employed as roustabout and roughneck, doing

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general oil field work in both drilling and production operations.

From March 1940 to March 1942 I was employed by W. R. Davis Company, an independent oil operator with headquarters in Houston, Texas, as Petroleum Engineer.

From March 1942 to May 1942 I was employed by Continental Pipe Line Company of Ponca City, Oklahoma, as Material Engineer and was located in the lower Texas Gulf Coast area. In May 1942 I was transferred to the Continental Oil Company, Production Department, as Petroleum Engineer, where I have remained until the present time.

My duties with Continental have progressed from performing routine field engineering work to supervising general engineering activities over various areas. In my present assignment, I work with interstate gas sales operations, performing reserve determinations, deliverability studies, economic analysis studies and general engineering operations.

I am a member of the S.P.E. Section of A.I.M.E., A.P.I., and a registered Professional Engineer in the State of Texas.

Q. Have you previously testified before this Commission or other administrative agencies? A. Yes, I have testified before the Texas Railroad Commission on numerous occasions. I have presented testimony before the Federal Power Commission in Washington on three

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previous occasions, under Docket No. G-18636, et al, Docket No. G-16966, et al, and Docket No. G-13221, et al. I have also testified before the Public Utility Commission of the State of California under Docket Nos. 42,931 and 42,932.

Q. Have you prepared or had prepared under your supervision a determination of the gas reserves under Continental's lease in the Johnson Bayou Field in Cameron Parish, Louisiana, from which United Gas Pipe Line Company has been purchasing gas for the past ten years? A. Yes, I have. Continental's proven gas reserve under its lease in the Johnson Bayou Field, Cameron Parish, Louisiana, has been calculated to be 6,368 million cubic feet as of February 1, 1963.

Q. This is Continental's interest, alone? A. Yes, sir.

Q. Have you prepared an exhibit, marked for identification as Exhibit No. 1, entitled "Field Map and Estimated Reserves of Continental Oil Company, Johnson Bayou Field, Cameron Parish, Louisiana"? A. Yes, I have.

Q. Please describe this exhibit. A. Exhibit No. 1 is composed of two schedules. Schedule 1 is a plat showing all producing gas wells in the field and their present completions. Continental's Cameron

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Parish School Board lease, which is dedicated to United, is shown with a cross-hatched boundary. Continental owns fifty percent working interest in this lease. There are two

gas well completions on Continental's lease. The No. 1 well, colored red, is completed in the J-1 reservoir and the No. 2 well, colored green, is completed in the O-1 reservoir.

Offset completions in the J-1 reservoir are General American Oil Company's Cameron Parish School Board No. 1, and C. H. Lyon's Gray No. 2. Offset completion in the O-1 reservoir is the C. H. Lyon's Gray No. 2, a triple completion. Other completions shown on the map are producing from other reservoirs which are also present under Continental's lease.

Schedule 2 is a tabulation by reservoirs of Continental's proven gas reserves as of February 1, 1963. Reserves are shown for two pressure bases, (1) 15.025 psia, which is the contract pressure base, and (2) 14.73 psia, the pressure base utilized by the Federal Power Commission.

Reserves have been calculated for nine reservoirs, seven of which are presently producing gas and two of which have had satisfactory formation production tests to insure their productivity. In addition, there are several untested sands under Continental's leases which are probably gas productive and which will be tested prior to abandonment of the field. Schedule 2 shows Continental's remaining proven gas reserve as of February 1, 1963, to be 6,368

million cubic feet at 14.73 psia pressure base.

Q. Are both the Continental gas wells to which you refer presently connected to the facilities involved in the previous sale to United? A. Yes, they are.

Q. What would you estimate for the depletion period for this 6,368 million cubic feet of gas reserve remaining attributable to Continental's interest? A. Based upon a continuation of the average rate of production for the entire field as well as Continental's lease for the year 1962, sixteen years would be required to deplete Continental's remaining dedicated gas reserves in this field.

Q. Mr. Rosser, in your opinion, is drainage of Continental's reserves in the Johnson Bayou Field occurring at the present time? A. Yes. There is drainage occurring at the present time due to Continental's wells being shut in. As I pointed out, other operators are presently producing from wells completed in the same reservoirs as both of Continental's wells. These offsetting wells are presently depleting these reservoirs which extend under Continental's lease. Continental will continue to suffer drainage as long as their wells are shut in.

Q. I refer you to what has been marked for

identification as Exhibit 2, which includes an assignment of 50 percent interest by Continental in the Cameron Parish School Board lease to Sohio Petroleum Corporation, successor to Yegua Corporation, and which includes the original lease taken from the Cameron Parish School Board as lessor in favor of Continental as lessee. Is this a correct photographic *copy of the lease and assignment*? A. Yes, it is.

Mr. Burton: That completes my direct examination. I move admission into evidence of Exhibits 1 and 2.

Presiding Examiner: Any objection?

Without objection, Exhibits 1 and 2 are received.

(The documents heretofore identified as Exhibit Nos. 1 and 2 were received in evidence.)

Mr. Burton: I tender the witness for cross-examination.

Presiding Examiner: You may cross-examine.

CROSS-EXAMINATION

By Mr. Woods:

Q. You said there had been wells completed into seven reservoirs in the Johnson Bayou Field, is that correct? A. I said——

Q. Nine, I believe. A. Yes, I have shown nine reservoirs as having reserves under Continental lease at this time. There are possibly other reservoirs in the field which I have not

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included, due to the fact that they may not be productive under Continental's lease.

Q. Are those nine reservoirs identified on Schedule 2 of your Exhibit 1? A. Yes, sir.

Q. Are they in the column that starts "H-4," and down through the line through "O-1"? A. That is correct.

Q. Continental has two wells under which it is selling or out of which it has sold gas to United, is that correct? A. Yes.

Q. What reservoirs among those nine are those two wells completed into? A. The No. 1 well is completed in the J-1 reservoir. The No. 2 well is completed in the O-1 reservoir.

Q. You say those wells are being drained. They have been drained for some time by other wells, have they not? A. I don't understand the question.

Q. Well, are you being drained? Is Continental's gas under its lease being drained that is available or exists in the reservoir H-4? A. No, sir. At this time there is no production from the H-4 reservoir.

Q. How about from the K-1 reservoir?

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A. Yes, sir, it is being drained in the K-1 reservoir.

Q. Are either of those two wells from which you have sold gas to United completed into the K-1 reservoir? A. No, sir.

Q. Then does it follow you are being drained in the K-1 reservoir and have been drained for some time, is that right? A. In the K-1, yes.

Q. How many years have you been drained in the K-1 reservoir? A. Since some time after commencement of production from that reservoir.

Q. Do you have any idea how many years that has been?

A. I believe those wells were completed in 1959.

Q. Then perhaps some four years you have been drained there? A. Yes.

Q. The fact United has discontinued receipts of Johnson Bayou gas doesn't affect that drainage in the slightest, does it? A. Specifically speaking, no, sir.

Q. In other words, you are being drained in K-1 reservoir and have been in the past for four years and have done nothing to avoid it, have you? A. Yes, we have.

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Q. What? A. In this particular field, as in most multiple reservoir fields, it is common practice to depend on counter-drainage from various reservoirs to offset the drainage from individual reservoirs.

Q. Has it been possible to work out such counter-drainage with respect to Reservoir K-1? A. Yes.

Q. Have you tried to work out such counter-drainage arrangement with respect to Reservoirs O-1 and J-1? A. I think so, apparently so. I have heard of no complaint, and in this particular field the problem is minimized much more so since there is a common royalty owner between the two lessees.

Q. Then do I understand you are saying insofar as you are aware the drainage that you have seen as a possibility in J-1 and O-1 resulting from discontinuance of receipts of gas from United—that drainage can be avoided by this counter-drainage measure to which you have referred? A. If I understand the question correctly, yes.

Q. Let's ask about the other reservoir you have shown there. Is Continental's lease being drained with respect

to Reservoir K-2? A. As to that specific reservoir I would say yes.

Q. K-3?

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A. Yes.

Q. K-4? A. Yes.

Q. M-2? A. No, the M-2 is not producing at this time.

Q. N-1? A. Yes.

Q. As I understand you to say, Continental is and has been for some time being drained in these particular reservoirs. Why didn't Continental complete its wells in those reservoirs? A. It would be physically impossible to complete its wells in all of the reservoirs.

Q. Does that suggest you could complete it in some part of them, those two existing wells, that you have not yet at this time completed? A. You are limited as to the number of completions you can make in a well, of course.

Q. Yes.

Now, could you have completed these two wells in more reservoirs than in which they are now completed? A. Yes.

Q. Why didn't you? A. I believe you could have.

Q. Why didn't you?

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A. As to the No. 1 well, it was the initial completion in the field, and at that time there was no problem, and it also—at that time, also, the present method of multiple completion was not widely practiced, at that time.

As to the completion of the No. 2 well, I don't know why they didn't complete it in more than one sand.

Q. Could you drill more wells in that area? A. Yes.

Q. Those wells could be completed into these reservoirs from which you have been drained in the past? A. Yes.

Q. Why hasn't Continental done that? A. I don't think it would be economically feasible to do so.

Q. You have shown the gas in the reservoirs on Schedule 2, including H-4, K-1, K-2, K-3, K-4, M-2 and N-1. Is that gas physically available to United under any conditions at this time? A. Is the——

Q. Could you deliver it to United even if United were purchasing now from Johnson Bayou Field? A. I didn't check off the reservoirs you named. But I believe you mean all the reservoirs other than the two completed in Continental's wells?

Q. Yes.

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A. No, that cannot be delivered to United.

Q. It could not? A. At the present time.

Q. Aside from the economics you could deliver gas out of those reservoirs if you drilled more wells, couldn't you? A. Yes.

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Q. And you could complete your two existing wells in additional reservoirs and deliver some of that gas, couldn't you? A. Yes, sir.

Q. You say you don't know whether there has been in fact any arrangement worked out so that this drainage to which you have been referring insofar as the J-1 sand and the O-1 sands are concerned, by which Continental, through this counter-drainage arrangement, can avoid the effect of this drainage you have referred to? A. I suspect there has been no attempt made to make any agreement for counter-drainage. We have kept track of the amount of production for the entire field and the amount of production from our wells and we are satisfied that our share of the total field production has been produced up until the time our wells were shut in.

Q. Now, beginning from the time your wells were shut in, have you made any efforts to achieve a counter-drainage

arrangement to avoid the drainage that may have occurred in your J-1 and O-1 reservoirs since January 31, 1963? A. I know of no arrangements.

Q. Do you know of any efforts by anyone to achieve such a counter-drainage arrangement, representing Continental? A. No.

Q. Do you know of any reason such counter-drainage

arrangements could not be made?

Mr. Burton: By counter-drainage does counsel mean Continental drains by taking in some reservoirs and other producers drain by taking off other reservoirs, which offsets each other?

Mr. Woods: You mean whatever the witness means.

The Witness: That is what I meant by drainage in the past when Continental's wells were being produced.

May I hear the question again, please? I don't understand it.

By Mr. Woods:

Q. Yes. I understand from your testimony that counter-drainage arrangements have been made by Continental—— A. I am sorry—I don't believe I said that counter drainage arrangements had been made. Did I say that?

I thought you said in the past there had been counter-drainage arrangements or agreements made by Continental with other producers in the Johnson Bayou Field that offset the drainage in these 7 reservoirs in which you are not completed. Is that right or wrong?

Mr. Burton: I don't think the witness——

Presiding Examiner: The witness may answer.

The Witness: If I said that, I didn't mean that. I am sure there has been no counter-drainage arrangements made as such. What I meant to say was that Continental feels like

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our proportion of the total field reserves has been obtained in the past.

Presiding Examiner: But you have no arrangements——

The Witness: I am sure there are no arrangements made as such.

Presiding Examiner: So in these reservoirs except the J-1 and O-1, they are being—they were being drained, under your acreage, is that correct, other than the J-1 and O-1?

The Witness: Other than the J-1 and O-1, yes, that is correct.

Presiding Examiner: Thank you.

By Mr. Woods:

Q. Does Continental have any intention ever to open the reservoirs that are listed on your Schedule 2 of Exhibit 1 other than the two in which those wells are presently completed? A. At this time I know of no plans to do so.

Q. The reason, so far as you are aware, is that it will not—it is because it is not economical for Continental to do so, is the reason, as far as you know? A. Not necessarily with respect to all of the wells, all of the reservoirs.

Q. Are there some that it might be economical for them to drill to or complete in, in which they have not presently completed, or not presently drilled to? A. Possibly. However, I strongly suspect there will be

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no additional wells drilled in this field since there are sufficient wells presently drilled to complete the entire field.

I am sure that some arrangements will be made in the future, possibly through forced pooling or unitization, which will take care of satisfactory drainage of all reservoirs in the field.

Q. Has Continental at this time attempted to get any forced pooling of Johnson Bayou Field? A. No, sir.

Mr. Woods: We have no further cross of this witness.

By Mr. Knight:

Q. Mr. Rosser, inviting your attention to Exhibit 1, Schedule 1, I notice between well No. 1 and No. 2 a 2½ inch pipeline, is that correct? A. Yes, that is commonly called a flow line, flowing from the well to the separator.

Q. To the—where is the separator? A. It is at the tank battery near the No. 1 well where the two small circles are shown.

Q. There is another two and a half inch line extending up towards the top of the page. Is that northward? A. Yes.

Q. To a delivery point to United Gas? A. Yes.

Q. Which way does the gas flow in that vertical two and a half inch line?

A. From the well to the north towards the United connection.

Q. So the gas from well 2 flows to the separator at Well No. 1 and then goes on up to the delivery point to United Gas, is that correct? A. Yes, sir.

Q. Both those lines were constructed by Continental, were they? A. Yes.

Q. When were they constructed? A. The two and a half inch from the well No. 1 to the delivery point at United's line was built in the early part of 1953 or just prior to commencement of the delivery to United.

Q. When was the line between wells Nos. 1 and 2 built? A. The line between No. 1 and No. 2 was built in 1959.

Q. Do you recall the month in which each of those two lines was built? Take first the line between wells Nos. 1 and 2, if you will, please? A. My records show commencement of gas production and delivery to United in January

1953. I presume probably it was the last day of January, since we only delivered slightly over one million cubic feet in January, so I presume it would be the latter part of January 1953. My records——

Q. Pardon me—— A. —show with respect to well No. 2 first production

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from that well in September 1959. I presume the line was laid shortly prior to that time.

Q. The line between wells 1 and 2 was probably constructed then in September 1959 and the line between well No. 1 and the delivery point was in January 1953 then? A. Yes, sir.

Q. What is the length of these two lines, each of them separately? A. The line from well 1 to the delivery point is approximately 3,200 feet, while the line from the well to—well 2 over to well 1 is approximately 1,200 feet.

Q. Were those two lines built for the express purpose of enabling Continental to deliver Johnson Bayou gas to United Gas? A. Yes, sir.

Q. Are those two lines in operation, being used now? A. They were used until the wells were shut in on January 31, 1963. Since then I am sure they have not been used.

Q. They have not been used since January 31, 1963? A. No.

Q. But were used up until then to deliver gas to United? A. Yes, sir.

Q. Directing your attention to the delivery point to United Gas on Exhibit 1, Schedule 1, just north of that point there is a short stretch of line going up to a black circle.

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What does that black circle represent?

A. I intended that to represent there a separator. I am not sure that that is the exact location, but I presume

it is, since that is the usual way of making those connections.

Q. Did you hear Mr. Barnett testify that United's separator and meter were at the point where the—where United's four-inch line connects with the 16-inch Mud Lake line? A. Yes.

Q. Do you accept that testimony as being a correct statement as to the location of the meter and separator? A. Yes, that is correct.

Q. Then that black circle would be moved slightly northward, wouldn't it? A. If you are thinking in terms of the exact scale——

Q. Yes. A. Yes. This where I have showed the delivery point is not intended to be to scale and to represent just 55 feet.

Q. Your map here then is not intended to show that United has pipe running—that is four inch pipe running from the separator to its Mud Lake line, is it? That doesn't follow from your description? A. You are referring to the exact distance?

Q. Yes. A. Yes, it would have been impossible to have shown 55 feet on this map with this scale.

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Q. But, as I understand the 55 feet of United's line is entirely to the south of the separator and meter. That was my understanding of Mr. Barnett's testimony. A. I thought the 55 feet was the distance from their line to the valve, which would be where I have shown as the delivery point, and the separator would probably be within that 55 feet. However, I don't know. I don't know the exact distance.

Q. Yes.

Mr. Burton: You do accept Mr. Barnett's correction of that, that it is to the north end of the entire 55 feet?

The Witness: Yes, that is a reasonable figure.

By Mr. Knight:

Q. Schedule 2 of Exhibit 1, now, who made the estimates of remaining reserves shown in that schedule? A. I made those estimates, using all available data.

Q. What method did you use to make them? A. Volumetric method of calculation.

Q. When were they made? A. My study has been made within the last two weeks.

Mr. Knight: Mr. Examiner, on this point I will not press cross-examination further on the matter of reserves because I do not believe frankly that it has any bearing on the issue before us in this proceeding.

Mr. Rosser says he used all available data. We could go into what data were used.

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However, I want to make clear that in the event that in an official proceeding, if there is application for abandonment of any facility by either United or Continental in which reserve data are involved, will be involved, I do not want to be precluded from further cross-examination on this subject at that time.

At that time, of course, the staff would come in with reserve data also.

Presiding Examiner: Yes.

What is the delivery pressure on that, Mr. Rosser?

The Witness: I am not sure. Something less than 1,000 pounds. I am not sure just what it is.

Presiding Examiner: Has there been any decline in pressure?

The Witness: In the wellhead pressures?

Presiding Examiner: Yes.

The Witness: The actual wellhead pressures?

Presiding Examiner: Yes.

The Witness: No, there has been very little decline in wellhead pressures.

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Presiding Examiner: Those reserve figures that you used in the J-1 and O-1 represent what per cent of the initial reserves?

The Witness: In J-1 and O-1?

Presiding Examiner: Yes.

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The Witness: Just a moment, Mr. Examiner.

Presiding Examiner: Just approximately.

The Witness: J-1 has been depleted approximately 19 per cent. O-1 has been depleted approximately 11 per cent.

Presiding Examiner: Thank you.

I didn't mean to interrupt.

Mr. Knight: That is all right. I have only one more question, I believe.

By Mr. Knight:

Q. Returning to Schedule 1 of Exhibit 1, Mr. Rosser, again referring to the two and a half inch flow lines shown there, does Continental have any use for those lines other than to deliver gas to United? A. I say for the line extending from well 1 to the delivery point at United—I would say they have no further use for that line.

The other line, further use of that would depend on whatever arrangements were made for any further delivery within the field.

Q. As to that line between wells 1 and 2, does Continental have any present further use for that line? A. That line would be used at any time well No. 2 was returned to production. Since the tank battery is located at well No. 1 it would probably be unfeasible to move that tank battery any time in the future as long as wells 1 and 2 were

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either or both of them producing.

Mr. Burton: The question was as to present use, though, Mr. Rosser. Accepting the fact that Continental is now not

producing, is there any other present use than to sell to United, to use that line?

The Witness: No, no.

By Mr. Knight:

Q. Does well No. 1 and also well No. 2—are they shut in at this time? A. Yes.

Q. When were they shut in? A. January 31, 1963.

Q. They were producing until that time, were they? A. Yes.

Q. And have not been producing since that time? A. That is correct.

Mr. Knight: That concludes my cross-examination, Mr. Examiner.

Presiding Examiner: Any further cross?

Mr. Rosser, I noticed that in the Exhibit No. 1 on your map, Schedule 1, you refer to a name General American Oil-HBP. What does the "HBP" stand for?

The Witness: That means the lease is held by production. Often times there will be a date under that lease showing the termination of the lease agreement.

Presiding Examiner: Who does the General American Oil Company sell their gas to?

The Witness: To Transcontinental Gas Pipeline Company.

Presiding Examiner: How far away is their pipeline, Transcontinental's?

The Witness: I believe their pipeline parallels United's pipeline to the north, in that vicinity.

Presiding Examiner: You mean they are close together?

The Witness: In the vicinity. I don't know how close. Reasonably close together. I believe they do parallel.

Presiding Examiner: And the gas wells to the right, are they sold from Transcontinental, the production from sands?

The Witness: Yes.

Presiding Examiner: To the right of your two and a half inch line?

The Witness: Yes. All the gas of the remaining wells in the field does go to Transco.

Presiding Examiner: Have you approached Transco as to whether or not they would be interested in this gas?

The Witness: I don't think I can answer that question. I have heard rumors or remarks made that they have.

Mr. Burton: We have another witness that I will put on for that question, Your Honor.

Presiding Examiner: Thank you.

Is there any redirect?

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Mr. Burton: Yes, sir.

REDIRECT EXAMINATION

By Mr. Burton:

Q. In response to Mr. Woods, you said no efforts have been made to obtain forced pooling in the Johnson Bayou Field so far? A. That is right.

Q. Is it not true, however, that negotiations are under way and have been under way for a while now looking toward voluntary unitization of the field? A. Yes, there has been considerable effort made to that end.

Q. Would it be reasonable in your opinion to anticipate those efforts would culminate in a voluntary unitization within a year or so? A. Yes, I anticipate within 12 to 16 months this should be completed.

Q. In other words, these negotiations are now in the state of getting the lessors and producers signed up, these are matters that have to be done, where you have various parties in the field, the producers you mentioned, and various lessors, and they have to come together on it, but

it does not appear at this time that we would expect failure of voluntary unitization. A. That is right.

Q. You referred to counter-drainage. You made it

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clear, I think, that this is not something that has been worked out by agreement. It is not a contract that I will drain you and you will drain me. But is it correct to say counter-drainage is a practice in the industry that one producer drains another in a reservoir where he is completed and the other drains him in a different reservoir where the other is completed, and that offsets losses each against the other? A. That is true. Continental, I wanted to make clear, has agreed among themselves that they are recovering their fair share of the gas in the field and that as long as that condition exists we are not concerned too much with whether we are getting the proper share in each individual reservoir.

Q. You mean Continental has agreed in its management, it is an informed judgment, rather than an agreement with another party; it is an informed judgment of Continental's management, you mean? A. That is correct, yes.

Q. In effect, then over the last ten years Continental has been satisfied in its judgment that it has taken a little more than its share perhaps out of the two reservoirs in which it has completed, which has offset about evenly the amounts it judges it has lost by drainage in other reservoirs to which it was not completed? A. My calculations will show we have recovered almost exactly proportionately to our share of the total field reserves.

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Q. What is our share, roughly? A. About 12 per cent—no, about six per cent.

Q. This is Continental's interest? A. Continental's net.

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Q. The 12 per cent refers to Sohio's other 50 per cent interest in the same lease? A. That is right.

Q. You have also pointed out, I believe, that a counter-drainage situation such as this is particularly practicable in the industry where you have a common lessor such as the Parish School Board here where no lessor is being hurt by an alien lessee draining him, is that correct? A. That is correct.

Q. In your opinion and that of Continental's informed management, would you conclude Continental would, by continuation of the existing practice in the Johnson Bayou Field of this counter-drainage or by unitization which would accomplish the same thing substantially—would you say Continental would be able over the estimated deliverability period remaining of these reserves of 16 years that Continental would be able to deliver the correct proportionate share of its remaining field reserves which you have estimated at 6368 MMcf? A. If the production of Continental's lease were to resume at the rates during previous years, Continental would recover their share of the gas in this field.

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P. And thus would be able to deliver to United that share? A. Yes.

Q. Has Continental ever been unable to deliver gas out of Johnson Bayou which United requested during the administration of the contract? A. Not that I know of.

Q. Since United has had previous contractual obligations and under any rate schedule filed now would have—strike that.

Since Continental has delivered gas to United only under a ratable obligation of United to take gas heretofore in your judgment would completion of the existing wells to other reservoirs or drilling of new wells have been desirable if Continental could not deliver more gas; that is, if

United did not deliver—did not request larger takes than it has in the past? A. There would be no purpose of drilling adidtional wells or making other completions or recompletions, since the present two completions are capable of delivering much more than the volumes of gas taken in the field.

Q. So the present completions have always been more than adequate to deliver all United has requested under ratable takes? A. Yes.

Q. If Continental were ever unable to deliver what it

felt to be its share of gas reserves remaining in the field through present completions in your opinion would Continental then properly look to the economic feasibility of further completions or drillings of new wells? A. I am sure they would.

Q. In your opinion, you don't think Continental's management would let their share of reserves go by the board for want of drilling or completing a well if that could be economically done, that drilling or completion? A. I think not.

RECROSS EXAMINATION

By Mr. Knight:

P. Again referring to Exhibit 1, Schedule 1, Mr. Rosser, I believe you mentioned in your testimony that well No. 1—at well No. 1 there is a separator, is that correct? A. Yes.

Q. You have then the flow lines running between wells Nos. 1 and 2 and from well No. 1 up to the delivery point and you have the separator there at well No. 1.

Did Continental have any other facilities which it used in delivering Johnson Bayou gas to United? A. I have two small circles on my map which I have meant to indicate separators. From these separators I have shown lines

which I mean to indicate gas flow lines to deliver the gas produced. I have not shown on the plat storage tanks for the

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storage of condensate.

Q. How many separators do you have? A. Two.

Q. Are both of those located at No. 1? A. Yes.

Q. Where are the storage tanks located? A. In the immediate vicinity of the separators.

Q. Are there any other facilities that Continental used to make that delivery of Johnson Bayou gas? A. Not that I know of. There are other facilities at the same tank battery, used for the production of oil wells, but none for the production of the gas.

Q. Yes. Thank you.

Presiding Examiner: Any further questions?

You are excused.

(Witness excused.)

Mr. Burton: I would call Mr. Fred Wilson as a witness.

Whereupon,

Fred B. Wilson

was called as a witness and, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Burton:

Q. Would the witness state his name, please? A. Fred B. Wilson. I live in Houston, Texas.

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Q. By whom are you employed? A. By Continental Oil Company. My title is Assistant Director of Natural Gas Sales.

Q. What are your primary duties in that capacity? A. To look after FPC activities of the company in connection with gas sales.

Q. In your performance of these duties, are you somewhat familiar with the general contractual negotiations of Continental sales of gas? A. I am.

Q. Mr. Wilson, you heard the question the Examiner posed to Mr. Rosser, I believe. Do you have any understanding of the prospects or lack of prospects of Continental selling Johnson Bayou reserves to Transcontinental Gas Pipeline Corporation? A. It is my general understanding that some of our people have talked to Transcontinental some little time back and that while there has been no understanding reached, that in general Transco said if gas were made available to them in the Johnson Bayou Field that they might be able to take it in small quantities, or some quantity, beginning about January 1, 1965.

Q. It is your understanding Transco could not take gas from Johnson Bayou prior to 1965? A. That is my understanding, yes, though I have not talked

to them myself. This is the word of people who negotiate these contracts in our regions.

Q. These negotiations were handled in Continental's Regional Division offices, which are the Production Department, and with which you are employed in the headquarters office in Houston? A. That is correct.

Mr. Burton: That is all I have of the witness, Your Honor.

Presiding Examiner: You may cross-examine.

Mr. Burton: Before they start, may I——

By Mr. Burton:

Q. Does Continental have any other outlet that it presently knows of for this gas other than to sell it to United? A. No.

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CROSS EXAMINATION

By Mr. Woods:

Q. Mr. Wilson, at the time Continental cancelled its contract with United, did Continental at that time seek any other market for its Johnson Bayou Field gas? A. I can't honestly answer that question. I don't know at what time these conversations took place nor with whom. I was merely told by some of our regional people that they had discussed the matter with Transco. I don't remember exactly when they talked to them, whether prior to the time this came up or after the cancellation of the contract.

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Q. If you didn't have another outlet for this gas, why did you cancel your contract with United?

Mr. Burton: Objection to the question which goes to the legal positions of the parties. It has never been Continental's position that it didn't have a market for the gas. The termination of a purely private contractual relationship does not interfere with our statutory or regulatory concept of a dedicated market to United and our rate schedule filing was never an abrogation of our sale.

Presiding Examiner: I understand your position. Your objection is overruled.

The Witness: I would say our contract was ended. I realize there has been considerable controversy over whether you can continue to deliver gas or not deliver gas, but actually our contract was ended. We were seeking the best market we could get for our gas, naturally.

By Mr. Woods:

Q. You are aware it was Continental who cancelled this contract, not United? A. Yes.

Q. I want to know why Continental cancelled it. A. For the purpose I just stated.

Q. I don't think that was an answer to my question. You had a market for your gas with United without cancelling the contract, it that correct?

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A. On a day to day basis, it was not on a permanent basis.

Q. Mr. Willson, this contract provides, as I understand it, that it would have continued in effect from year to year after January 31, 1963 unless either Continental or United chose to cancel it. Now, Continental cancelled it? A. That is right.

Q. Now, it wasn't because it lacked a market that it cancelled it, was it? A. I would say not for lack of a market—at that price.

Q. Oh, now, I think we are getting down to the purpose for which Continental cancelled the contract. It cancelled the contract for what reason, Mr. Willson? A. Well, I would say for the reason that the contract had terminated. It was a ten-year contract in the first place, and it could continue on a year to year basis, it is true, unless cancelled by either party. We chose to cancel it because it was no longer a satisfactory contract.

Q. Why was it no longer satisfactory, Mr. Willson? A. It was not satisfactory because there were no future terms in the contract. The price was low, it was a contract that we had to accept at the time because there was no other market.

Q. You say there were no future terms in the contract? A. Well, no stated escalations beyond——

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Q. All right. Isn't it a fact Continental cancelled this contract because it thought by so doing it could get a higher price out of United? A. I don't think so, necessarily.

(120)

Q. What other means was there? A. Well, we—yes, I would say get a better price, but not necessarily out of United.

Q. Out of anybody else? A. Perhaps.

Q. Did you try to get one out of anybody else? A. Not that I know of.

Q. Isn't it true you were interested in finding a new market different from United, from your Johnson Bayou gas? A. No, we would like to have sold to United.

Q. It was to achieve a better price that Continental cancelled the contract? A. Well yes, we wanted a better price for gas, surely. It was much below the current prices, the going price in the field.

Q. That is the only reason you cancelled, isn't it? A. That and the fact the terms are indefinite.

Q. What is indefinite about this contract? A. Well now, nothing, other than that it is a year to year contract and we normally sell gas on a 20-year contract.

Q. This contract would have continued in effect under its

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terms until that field was depleted had Continental or United not chosen to cancel, isn't that true? A. That is correct.

Q. Then it wasn't because—— A. If that is an entirely satisfactory way to dispose of gas, yes.

Q. The only unsatisfactory thing about it to anyone as between Continental and United—— A. Was price.

Q. —was price. That is correct, isn't it? A. Sure.

Q. And Continental wanted a higher price? A. That is right.

Q. And United said, "We won't pay it?" A. That is correct.

Q. And that is what this comes down to, So Continental says, "We will cancel it" and that is the only reason Con-

tinental cancelled, to get the higher price? A. We would like a higher price, and more definite terms.

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Presiding Examiner: What more definite terms do you refer to?

The Witness: A contract, sir—you are obligated to deliver gas, but you know all you are going to get is the ten cents. I would say that that is a definite enough term, but it is not a very satisfactory way to sell your gas when your gas is worth more.

Presiding Examiner: The only feature to which you really objected in the contract was price? Or was it some other term, such as the rate of take, or something like that?

The Witness: As far as the rate of take is concerned I am not too familiar with the——

Presiding Examiner: Let's simplify it. Today if you were entering into a contract with United, what terms would you ask for? Besides price, I mean.

The Witness: Well, I would ask for the going initial price with escalations in there to take care of increasing costs, reasonable escalations, let us say, over the period of the next 15 or 20 years, whatever period of time the reserves would warrant.

Presiding Examiner: And as to the other provisions in the contract they would be satisfactory to you?

The Witness: Not this particular contract, no. There are many other provisions that I think that I would want to change. If I remember the contract rightly, I

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think there is a commitment of all reserves, that is, of all horizons from the surface on down to whatever depth that gas might be discovered.

There are perhaps several other provisions in there, I don't recall this contract explicitly, I have not read it just recently.

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But in general, Mr. Examiner, it was a contract which committed you to the production—if you discovered production at any depth it would be dedicated to this contract. That I think is a term we wouldn't want to sell gas under, under that sort of price arrangement.

Presiding Examiner: Did you have that in mind at the time you canceled the contract, to change that provision?

The Witness: That was one of them. As I say, it was not a contract such as was 100 percent satisfactory to us. We made it a time when there was no other market. We would not have made it for the ten-year period had we not been required to in order to make the sale. We had no choice. United was the only taker in that particular area at that time.

Presiding Examiner: And today you figure you have a choice, so you would want to change the contract terms?

The Witness: If we were free agents, yes, we would change the contract terms, yes.

Presiding Examiner: If you didn't sell to United you

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would sell to Transco, is that it?

The Witness: We would sell to anyone who would buy.

Presiding Examiner: That would be Transco, wouldn't it?

The Witness: I presume there are others in the general area, but I believe Transco is the only one in the field, right there, that is right.

Presiding Examiner: In other words, you would sell the gas to someone else if you were a free agent today?

The Witness: Oh, yes.

Presiding Examiner: Or you could.

The Witness: Yes.

Mr. Woods: Thank you.

Redirect Examination

By Mr. Burton:

Q. Is it your statement we could sell the gas to Transco today and they would take it? A. No——

Presiding Examiner: He said he would sell it to someone else today.

By Mr. Burton:

Q. To whom else could we sell it? A. As I understand it we cannot sell it to anyone else, there is no one else to buy it.

Q. No one would take it today, if we had our choice about it? Or did you so understand the question?

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A. Yes, I said we would sell it to anyone who would pay us on the terms we wanted.

Q. But you weren't saying we had any other choice at this moment? A. We do not.

Q. And we don't have anything that appears even to be a choice prior to 1965? A. That is right.

Q. Which might be a choice with Transco at that time but not before? A. That is correct.

Presiding Examiner: When I asked you whether if you were a free agent you could sell it to anyone else, then you did not understand my question and were mistaken in your answer, is that what you are saying?

The Witness: No, I think you and I are—I think Mr.——

Presiding Examiner: I am aware of the questions just asked you. I am asking you, if you were a free agent today, and you said you could sell the gas to someone else, I am asking what you had in mind.

The Witness: My answer to that, sir, would be that we would sell it to anyone who would give us satisfactory terms.

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Presiding Examiner: And did you have someone in mind who could give you those satisfactory terms?

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The Witness: No, we do not.

Mr. Burton: I think that is where you are apart. We would if we could.

Presiding Examiner: What is the General American Oil getting for its gas that it is selling to Transco?

The Witness: I do not know.

Presiding Examiner: What establishes the going price in that area?

The Witness: Well, I think the area levels set by the Federal Power Commission.

Presiding Examiner: But you don't know what anyone else in this area is selling their gas for?

The Witness: No. I understand there are some sales down there around 20 cents.

Presiding Examiner: Around 20 cents?

The Witness: Yes, sir.

Presiding Examiner: What price do you understand the Federal Power Commission set the gas for?

The Witness: Well, the South Louisiana price is 21¼, set by the——

Presiding Examiner: Why are you willing to sell it for 15 cents, and so forth, to United?

The Witness: I say for initial sales.

Presiding Examiner: But why are you willing to sell your gas for around 15 cents?

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The Witness: Well, increased prices on the old contracts, 14 cents plus the tax reimbursement, set by the——

Presiding Examiner: The difference is that it is an initial sale?

The Witness: Yes.

Presiding Examiner: Thank you.

Any further questions?

Mr. Burton: Just a little further redirect, or whatever it is at this point.

By Mr. Burton:

Q. Would you say Continental's judgment in filing for a rate increase to 14 cents plus the 1.75 cents tax reimbursement was influenced by the policy statement announcements of price levels for old sales with some thinking in Continental's mind that there would be an advantage in foregoing a higher price if we could get a price that appeared to be in keeping with the Commission's thinking effective without suspension? A. Yes.

Q. In other words, we might forego a little bit on this sale to avoid a rate hearing? A. That is right.

Q. In making a new sale, we would be more apt to look towards the 21-cent policy level price suggestion for new sales? A. Yes.

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Q. In connection with the termination of this contract Mr. Barnett testified and referred to various letters exchanged between Continental's management and United's, seeking in part on Continental's behalf renegotiation of a contract, or negotiation of a new contract, or contract amendment which would have provided a 14-cents price plus the tax reimbursement to which we have unilaterally filed, would have provided future escalations and also have provided a fixed 20-year term.

Was this not—is this not a correct reflection of the correspondence and negotiations made by Continental prior to termination of this contract? A. I believe that is right.

Q. In other words, not only a price acceptable to us with some escalations in the future, too, but also a 20-year term instead of the continuing year to year term, which you

said is not the way we would like to sell gas, did enter into our negotiation for a new contract, which was unsuccessful? A. That is right.

Q. When these negotiations for a new contract at this more satisfactory price and longer fixed term were unsuccessful, then did Continental conclude to cancel the contract as it had existed with United? A. That is right.

Presiding Examiner: Let me ask you, would you be

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willing to sell gas to United without a 20-year term contract?

The Witness: Without?

Presiding Examiner: Yes.

The Witness: You mean at this location or in general?

Presiding Examiner: We are talking about this location.

The Witness: Yes, if the—I think it would depend on the size of the reserves and the contemplated take. If we felt they would be exhausted in a shorter period of time, yes.

Presiding Examiner: Let's take it until we can get something definite, limited to this particular field, the Johnson Bayou Field, and your acreage therein.

Now, the question is—and the reserves as you know them—the question is: are you willing to sell gas to United at a lease of 20-year term?

The Witness: Yes, I think we would be.

Presiding Examiner: Are there any particular years in mind, or is it on this year-to-year basis?

The Witness: Well, we would certainly not want to do it on a year-to-year basis.

Presiding Examiner: You would not want that?

The Witness: No.

Presiding Examiner: How long would you want?

The Witness: Well, I would say we wouldn't want to consider anything less than a 10-year term.

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Presiding Examnier: Now, on that 10-year term, I am going to ask you this: Unless you have the 10-year term you don't want to sell gas to United. Do I understand that correctly?

The Witness: Well——

Mr. Burton: Yoes Your Honor mean under contract?

Presiding Examiner: Yes, a 10-year term in your contract, without that you do not want to sell gas to United. Do I understand that correctly?

The Witness: Just offhand, sir, the reserves there I think would warrant a 10-year term, yes.

Presiding Examiner: The answer to my question is that you would not sell gas unless you had a 10-year term in your contract with United. Am I correct in my understanding?

The Witness: That is what I would desire, yes, if we were a free agent that is what I would desire.

Presiding Examiner: In other words, as you are sitting there now. I don't understand what you mean by the qualification if you were a "free agent."

Mr. Burton: I am not sure you two are together.

Presiding Examiner: If you will wait a minute we will get together.

What you are asking for, then, Mr. Wilson, is a 10-year contract from United relating to the purchase of this gas, is that correct?

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The Witness: I think we would be satisfied, yes.

Presiding Examiner: Fine.

And if you don't get it you don't want to sell gas to United, is that correct?

The Witness: That is correct.

Presiding Examiner: Thank you.

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By Mr. Burton:

Q. Do you mean we don't want to sell gas to United under contract if we do not get a 10-year contract, or do you mean we don't want to sell gas to United at all under regulation? A. I mean unless we get a 10-year contract.

Q. You mean we don't want to sell gas under a contract to United and do not want to make a contract with United unless we get at least a 10-year contract? A. Yes.

Q. But Continental is not unwilling to meet its obligation to continue to perform under its rate schedule to sell gas to United as the Commission and its certificate dictates? A. Definitely not.

Q. Would you say Continental is definitely not a free agent in making jurisdictional sales in interstate commerce? A. That is right.

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Q. In other words, is it——

Mr. Knight: Mr. Examiner, I have kept quiet with these leading questions a long time, but I think it is time we got away from leading questions and allowed the witness to testify.

Presiding Examiner: Yes, because I think we are getting two different answers.

Mr. Knight: I think so. I object to these leading questions.

Presiding Examiner: You are right. The objection is sustained.

Mr. Burton: No further questions.

RECROSS EXAMINATION

By Mr. Knight:

Q. How much Johnson Bayou gas did Continental sell to United in 1962? A. I can't answer. I don't know.

Q.nDo you know the volumes of Johnson Bayou gas that Continental has sold to United in any year? A. No, I know

the sales have varied there from around one million or one million and a half, averaged about one million and a half a day.

Q. You mean cubic feet? A. Yes. I don't know the cumulative amounts.

Q. I am speaking of the amounts sold in any one year.

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You don't know the amount sold in any one year? A. No, sir.

Q. Do you know what the contract provision as to the minimum take or pay is? A. There is no minimum take or pay in this contract, as I recall it, sir. It is merely a ratable take.

Mr. Knight: That is all.

Presiding Examiner: Any further questions?

You are excused, sir.

(Witness excused.)

Presiding Examiner: Do you have any further witness?

Mr. Burton: No, Your Honor.

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Presiding Examiner: Does anyone else have any witnesses?

Do you have any rebuttal?

Mr. Woods: United Gas Pipeline Company has no rebuttal, sir.

Presiding Examiner: Very well then. The question comes up as to time for transcript corrections and briefs.

Do you have any suggestions as to time?

Mr. Knight: Your Honor, would two weeks on corrections be all right?

Presiding Examiner: What do you have in mind?

Mr. Knight: June 17th. Is that satisfactory to other counsel?

Presiding Examiner: Is that satisfactory to everyone? And objections five days thereafter. That would be June 21st for objections.

Mr. Burton: Could we make it on the following Monday?

Presiding Examiner: All right.

Mr. Knight: That would be June 24th.

Presiding Examiner: Very well.

We will set June 17th for corrections and objections thereto on or before June 24th.

For briefs?

Mr. Knight: Your Honor, what will be the order of briefs? Will it be all simultaneous briefs? Since United and Continental have already filed briefs, I suppose their briefs

would be pretty much what they have already put in the record.

Mr. Woods: I am a little at a loss in this matter.

Presiding Examiner: Fine. We will forget the old brief and start over again.

Mr. Woods: All right. I have written three or four. I can write them practically by rote now.

If we are going to start over, we ought to be able to rewrite this thing and get it back up here within two weeks.

Presiding Examiner: I was thinking, on the order of briefs, that United would have the initial brief, the other parties may answer, and then United would have rebuttal, of course, if that is agreeable to everyone. Two weeks.

Then for the answering briefs how long?

Mr. Knight: How about July 12th for the answering briefs?

Mr. Burton: That would be satisfactory.

Mr. Knight: The 17th is two weeks from today, June 17th.

Mr. Woods: You are asking for a chance to reply to both briefs?

Mr. Knight: No.

Presiding Examiner: No, I was thinking the first initial brief should be some time—filed after any objections to the transcript corrections, I mean as an order of procedure.

Mr. Woods: Yes, I would think so. I suppose the answer is to make it two weeks after June 24th, so we would have our——

Mr. Knight: That would be July 8th.

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Mr. Woods: United would file its initial brief on July 8th.

Presiding Examiner: All right. Then your answering briefs?

Mr. Knight: July 22nd, Your Honor, two weeks after United's.

Presiding Examiner: And your reply brief?

Mr. Woods: May we have until August 5th?

Presiding Examiner: Very well.

The date fixed for United's initial brief will be on or before July 8th. The answering briefs will be due on or before July 22nd, and United's reply brief will be due on or before August 5th.

Gentlemen, is there anything further to come before this hearing?

If not, the hearing is concluded.

(Whereupon, at 3:30 p.m., the hearing was concluded.)

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Errata Transcript

(Omitted in printing; corrections made in text)

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Hearing Room "F-G,"
Federal Power Commission,
441 G Street, Northwest,
Washington, D. C.,

Tuesday, February 4, 1964.

The above-entitled matter came on for oral argument, pursuant to notice, at 10 o'clock a.m.

BEFORE:

JOSEPH C. SWIDLER, Chairman
LAWRENCE J. O'CONNOR, JR., Commissioner
CHARLES E. Ross, Commissioner
HAROLD C. WOODWARD, Commissioner
DAVID S. BLACK, Commissioner.

APPEARANCES:

VERNON WOODS,
Box 1707, Shreveport, La., appearing on behalf of United Gas Pipe Line Co.

BRUCE R. MERRILL,
P. O. Box 2197, Houston, Texas, appearing on behalf of Continental Oil Company.

C. LOUIS KNIGHT,
appearing on behalf of the Staff of the Federal Power Commission.

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PROCEEDINGS

CHAIRMAN SWIDLER: We shall now hear oral argument in the matter of Continental Oil Company, Docket No. CI63-979, pursuant to the Commission's order issued December 26, 1963.

You have been furnished a statement showing the order in which the parties will appear and the allocation of time for presentation of argument. I now hand a copy of this statement to the reporter and ask that it be copied into the record at this point as though read.

Allocation of time for oral argument before the Commission:

United Gas Pipe Line Company, 50 minutes;

Continental Oil Company, 30 minutes;

Commission's Staff, 20 minutes;

Total, 100 minutes.

Counsel will state his name and the name of the party he represents before beginning his argument. Counsel for United Gas Pipe Line Company may reserve a portion of his time for rebuttal.

Counsel for United may proceed.

ORAL ARGUMENT OF VERNON WOODS

Mr. Woods: Mr. Chairman, may it please the Commission, my name is Vernon Woods, and I represent United Gas Pipe Line Company.

I assume that the portion of time not used in my initial

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argument will be available to me for reply?

Chairman Swidler: Yes. Would you like a warning?

Mr. Woods: I would like a 30-minute warning, if I may.

Chairman Swidler: By all means.

Mr. Woods: This proceeding was initiated, as the Commission is aware, by an order to show cause, directed to United Gas Pipe Line Company on the complaint of Continental Oil Company. The Hearing Examiner heard evidence on this show-cause order. The matter was briefed to him and he decided the controversy in favor of United Gas Pipe Line Company, and he ordered the show cause order dismissed. United filed no exceptions, of course, to

the Examiner's decision, but the Staff and Continental both disagreed with the Examiner, and each of them filed exceptions.

This show-cause order the Commission issued directed United to do something specific, obviously, and that was to show cause why it should not have obtained this Commission's approval before ceasing operation of facilities which United had heretofore used to purchase John Bayou field gas from Continental Oil Company.

At the outset, let me state United's position in one sentence. It is United's position that if Continental had the lawful right unilaterally to increase the price United had agreed to pay for this gas, then United has the right lawfully not to buy Johnson Bayou field gas on the terms which Continental

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unilaterally fixed.

The facts of this case are important to United's presentation, and I want to be sure that the Commission understands the facts and understands and sees the legal consequences which United says flows from the facts. If this is done adequately, United is confident the Commission will affirm the Examiner's dismissal.

On January 2, 1953, a little over ten years ago, United and Continental sat down and entered into a contract. This contract covered the sale by Continental and the purchase by United of gas which Continental would produce from the Johnson Bayou field. It fixed a price for the gas. It was 10.79 cents per Mcf, and that included tax reimbursement. It also contained a term. It was for a term of ten years, but the contract contained something more about term, it was this: That the contract would after expiration of the ten years automatically continue in effect from year to year with the continuing right in either party to terminate the contract by giving the other party

90 days' prior written notice before any expiration of an annual period.

In this ten years of primary term after United and Continental had executed this contract, as this Commission is aware, the price of gas in South Louisiana increased substantially, and therein lies part of our problem. United wasn't at all surprised when almost ten years after executing the contract, as

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a matter of fact in October, 1962, it received a letter from Continental relating to this Johnson Bayou field contract, and this is what Continental told United in that letter. I quote: "Continental Oil Company hereby gives notice to United that it elects to terminate said contract as of the 31st day of January, 1963."

So we have Continental taking advantage of the cancellation provision and giving United notice that it was canceling the contract applicable to this purchase. United recognized Continental's contractual right to cancel this contract and as a result it did nothing, but the evidence adduced before the Examiner shows that Continental wasn't idle during that period of time. There was a Mr. Wilson who testified for Continental. He is Continental's assistant director of natural gas, and he testified at the hearing that Continental had gone out and actively sought a new purchaser for this Johnson Bayou field gas other than United, and that the object and purpose, of course, was to obtain a purchaser who would pay a higher price than United had been willing to pay, but he said unfortunately for Continental their efforts were unsuccessful, and they were not able to find another purchaser for Johnson Bayou field gas.

Well, about a month after we had gotten this letter from Continental, Continental came to United and said we have a proposition to offer to you concerning Johnson Bayou

field. In substance Continental told United this: We are willing to

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continue selling you Johnson Bayou field gas. We are willing to execute a contract with you. We are willing to execute a 20-year contract with you for this gas, but concerning price we have some very specific and definite requirements. First of all, we want your agreement to a 15.75-cent price per Mcf for the first five years of this 20-year contract. Next, we want your agreement to an increase in that price of one cent each succeeding five years, and finally we want your agreement to this, that you will allow Continental to charge the highest price this Commission fixes in its area rate proceeding or may thereafter fix in any proceeding applicable to South Louisiana gas.

Well, United wasn't willing to agree to those terms. It didn't want the price, and it wasn't willing to agree to an obligation to pay any increased price this Commission might allow in the future for that gas. United didn't then actually need Johnson Bayou field gas in order to deliver its then current requirements of its customers. They could deliver those requirements without Johnson Bayou field gas easily.

Under those circumstances it told Continental it wasn't willing to enter into such a contract. United wasn't, however, willing to leave it on the basis of we won't give you a market, we won't enter into a contract. I said to Continental, we will assist you in this way: You apply to the Commission for an abandonment of this sale to United, and we will support you. We will do all our effort to attempt to get the Commission

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with our testimony and support to let you abandon this sale to us so you can sell it to someone else, and in the

meantime so you won't be denied the market we will continue to buy your gas on the contractual basis until the Commission acts on your abandonment application. We are willing to pay you the price that we have been paying you during this period of time, under the old contract.

Well, this wasn't satisfactory at all with Continental. Continental said we aren't at all interested in applying for an abandonment. We want the price that we have asked you and we intend to get it, and if you won't agree to it contractually we will get it by filing it unilaterally with the Commission.

So on December 28, 1962, Continental did exactly that. It filed with this Commission a notice of change in rate, in which it asked that the price or notified of a change in the price to 15.75 cents per Mcf.

Now, Continental asked the Commission to make this increased price effective on January 31, 1963, which was the time the old contract would terminate under Continental's notice of termination. United filed with the Commission immediately a formal protest, and asked that this change be not allowed. However, the Commission, without insofar as United was aware taking any action on formal protest, on January 25, 1963, mailed Continental a form letter in which it said that the changed rate was effective as asked by Continental. In response

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to United's further protest the Commission issued an order in which it held that Continental was entitled to file this changed rate and make it effective as a matter of law.

Now, during this interim, during this period of time, United advised Continental that when the contract termination became effective, on January 31, 1963, that United was going to discontinue receipt of this Johnson Bayou field gas, and it did that. It closed the valves leading into

its facilities, and it has not received any Johnson Bayou field gas since January 31, 1963.

Now, there are other facts in this case which I will mention later, but the facts which United wishes here to emphasize are these:

First, it was Continental that canceled the contract under which it was selling this gas to United;

Second, Continental refused to apply to this Commission for an abandonment of this sale when United said it could and would support Continental's application; and

Thirdly, Continental unilaterally filed the rate to which United had refused to agree, which rate was presumably the highest this Commission would allow then or in the future.

Chairman Swidler: Has United agreed to any similar contracts in Johnson Bayou field?

Mr. Woods: Continental is the only producer, sir, in Johnson Bayou field.

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Chairman Swidler: I see.

Commissioner O'Connor: In the area?

Chairman Swidler: Is there any problem of discrimination here? Have you agreed to terms similar to this with producers elsewhere?

Mr. Woods: Do you mean have we agreed to buy gas on an open end rate schedule filing such as Continental has, is that it?

No, sir.

Commissioner O'Connor: Were you attaching other gas reserves at those prices, equal to or in excess of what Continental filed for at that time?

Mr. Woods: There were some very minor reserves added, sir. Let me explain this briefly because Continental makes quite a point of that.

United has a very serious problem in South Louisiana,

as I am sure the Commission is aware. It has a tremendous take or pay for problem down there, and we have over 22 million dollars in the hands of producers we have paid for gas that we haven't received, so United is not buying gas in South Louisiana.

Now, United does have a policy and has always had a policy of trying to help where leases are about to be lost or where drainage is really a serious problem. We live with these producers, and we have lived with them for almost 40 years, and we expect to continue to do so. So we have bought, I think,

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two or three wells in the last few years in South Louisiana where the problem was very serious, but in doing that we had arrangements made so it would not influence or adversely affect our take or pay for situation.

The price paid was higher than the 15.75 cents, because the gas was being bought in fields where the price then being paid was higher than the 15.75.

Commissioner Ross: Are you the only outlet to the Johnson Bayou fields?

Mr. Woods: At the present time we are the only pipeline there. Transcontinental Gas Pipe Line Company goes within a few miles of the field, but we are the only outlet and Continental is the only producer.

Commissioner O'Connor: How many wells are in that field?

Mr. Woods: It is my impression Continental has two wells.

Commissioner Ross: Are they suffering any drainage by your refusal to purchase? If they are the only producer, and you are the only outlet, unless they have—what type of wells are these?

Mr. Woods: Continental can better tell you what type wells they are. I understand this is casinghead gas, that

they are oil wells, although perhaps—well, you will have your chance, Mr. Merrill. One of these may be a gas well, and there may be some drainage. I am not aware that there is any.

In any event, our position is that Continental has put

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itself in this position, it has done so knowingly and has taken a chance on the consequences, and we think has probably miscalculated the consequences.

Now, I have set out those facts, and I want to, along with this problem of where Continental may be, I want to make it clear that Continental was the moving party in this sequence of events. It canceled the contract.

Now, Continental's theme in its complaint is that it is entitled to some help because it is forced against its will to sell gas to United, but it is United's position, and I think it is a fact, that this is far from a correct picture of the facts. Continental was unable to find another buyer for its gas admittedly, so Continental isn't being forced to sell its gas to United. It isn't in the least bit desirous of being rid of United as a market outlet for its gas. The fact of the matter is that Continental thinks it has found a situation entirely to its liking in which United is going to be forced to buy gas on Continental's terms.

Well, we submit that Continental mistakenly sees in these circumstances (1) a captive market, and (2) the highest price this Commission will allow, and (3) deliveries on terms unilaterally fixed by Continental, in which United has absolutely no bargaining powers.

Now, the matter which I wish to discuss from those facts is the very heart and foundation of United's position in this case.

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It grows out of the fact, as I have said, that Continental changed the contractual relationship that it had with United

to an ex parte relationship with United, insofar as Johnson Bayou field gas is concerned.

The point is there is now no contract between United and Continental whatsoever. The terms and conditions on which Continental is willing to sell its Johnson Bayou field gas, its existing rate schedule, if there is one on file with this Commission, were determined by Continental independently and unilaterally from United. They were filed by Continental unilaterally with this Commission over United's objection. There is no agreement between Continental and United as to the terms on which this gas will be sold and purchased.

The point I emphasize is that Continental set out and achieved a break from a contractual relationship to an ex parte relationship, and it filed unilaterally the terms and conditions on which it will sell this gas with the Commission, and if this Commission has ruled Continental has this right, then United has the right not to buy Johnson Bayou field gas. This is and always has been the right of a buyer under a unilateral contractual arrangement, and there is nothing in the Natural Gas Act that changes it whatever.

Now, it is United's position that the Supreme Court has said this time and again, with reference to the Natural Gas Act. We start off by referring the Commission to the often

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quoted Mobile decision. United was involved in that case, United Gas Pipe Line Company v. Mobile Gas Service Corporation. There the question was whether United could during the term of the contract unilaterally file with this Commission increased rates higher than those contained in its contract with the distributor in the City of Mobile.

To answer that question, the Commission went into the background and philosophy of the rate-making powers

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under the Natural Gas Act. It discussed it extensively and it is important here to a resolution of this problem. Here is what the Supreme Court said. It said there are two and only two courses open to the seller of natural gas for the fixing of its rates, and I quote one brief paragraph from the court's decision:

"The obvious implication is that except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act, to establish ex parte and change at will the rates offered to prospective customers or to fix by contract and change only by mutual agreement the rate agreed on with a particular customer."

Let me repeat the first one, to establish ex parte and change at will the rates offered to prospective customers. It was this first alternative Continental seized on insisting that it had the right ex parte to fix its rate for natural gas and

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to change it at will without United's consent. That is the alternative it has chosen.

It did that when it canceled the contract with United and substituted therefor an ex parte relationship.

Now, a necessary part of that alternative in the language of the court is that the seller offers its gas to the buyer as a prospective customer. This means a buyer who is not bound by contract. This means a buyer who in the words of the court is a prospective customer.

Commissioner Black: Mr. Woods, don't you think that the significance of this case might be affected by the fact that this was a sale by a pipeline to a distributor, as I understand it, rather than a sale by a producer to a pipeline?

Mr. Woods: Well, I don't understand—I don't see why

it should be. Producers and pipelines supposedly come under the Act insofar as the certificate provisions are concerned, the abandonment provisions are concerned. There is nothing in the Act I have been able to find that suggests one is entitled to any preferential treatment when he comes to selling gas, that a producer, for example, is entitled to a better position in the sale of gas than United was entitled to in the sale of its gas to a distributor. I don't think so, sir.

This language that I have referred to here was not ill considered or hastily adopted by the Supreme Court, obviously, because it was repeated in the Memphis decision, it was repeated

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verbatim and followed there, and, more than that, the Supreme Court has really considered this specific problem. It did so in the Sunray case, and the Sunray case followed completely the Philosophy of the Mobile case, and the Memphis case insofar as sales under ex parte arrangements are concerned.

The Sunray case, which will be referred to by both parties, I am sure, in this proceeding is cited as Sunray Midcontinent Oil Company v. Federal Power Commission. There the Supreme Court said that an actual gas company selling gas after its contract with the buyer had expired, and that was a producer, Sunray, and it was selling gas to United Gas Pipe Line, there the Supreme Court said that after the contract had expired such as it has here that the seller would be free to make rate changes without the buyer's consent, but the Court was careful to point out, consistent with both Memphis and Mobile, that the producer enjoying such freedom was obligated to continue to deliver gas only on the buyer's request.

Speaking of Sunray's rights and obligations after expiration of the contract term, the Supreme Court said,

and I quote, "It will be free, then, as it was not free during the contract term under the contract here in question, to make rate changes under section 4 without United's consent." But while pointing to this right in Sunray to make these changes without United's consent, the Court in the same paragraph pointed to this condition of that right: "When it expires"—the

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contract—"petitioner"—that is Sunray—"to be sure it is under an obligation to continue to deliver gas to United on United's request, unless it can justify an abandonment before the Commission."

Now, Sunray's obligation was to continue to deliver gas to United on United's request, not on Sunray's demand, not on Continental's firm and not on the Commission's direction. The Supreme Court's use of the words "United's request" was meaningful. It was necessary in order for the Sunray decision to be constituent with the court's holdings in Mobile and Memphis, for the Court, I remind you, spelled out that one selling under an ex parte arrangement as distinguished from a contractual arrangement offers its gas to one who is not bound by contract but offers it to a prospective customer.

Let's go further along this line. The court's use of the words "United's request" was not unmeaningful or accidental. It is clear from the decision itself that the Court there considered in effect the problem that Continental presents here, because Sunray there made the argument that such a relationship would place the producer in a position of inequality with the buyer, because—and this was the argument Sunray was making to the Supreme Court—it must supply gas to United without a corresponding obligation on United to take it, and that is what we have here. That is the position that Continental finds

itself in. In other words, the identical problem which Continental

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here poses was argued to the Court, and the Court nevertheless held that the producer's protection under those circumstances was the right to increase its rates without the consent of the buyer, which Continental has availed itself of, but it said, deliveries of the higher priced gas, priced without the buyer's consent and over the buyer's objection, are to be made only on the buyer's request.

There is a balancing of these rights. In considering the alleged inequality which Continental here suggests, and offers, the Court said, and I quote this, "It is said that petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it, but United, subject to the Act in its sales to local distributors, has its obligations, too, and, if, in fulfilling them, it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under Mobile, it may be discovered that each side has its bargaining strength."

Now, that is the end of the quotation.

Now, Continental's bargaining strength here is, as the Court pointed out, the right to raise its price without United's consent. It has availed itself of that right, that is its protection, but if United is prohibited by law from rejecting this higher priced gas, then United has no bargaining strength whatever in the circumstances, and the Supreme Court's language is

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meaningless.

Now, we don't think the language is meaningless, and we don't think that a producer was intended to have that kind of advantage over a buyer in these circumstances.

The Supreme Court has spelled out very clearly, in three cases, that the right of a seller of gas who has availed itself of an ex parte relationship is to change its rates admittedly without the buyer's consent, but it has made equally clear that the buyer isn't under those circumstances forced to buy gas, it buys gas if it asks for it under those conditions.

Chairman Swidler: Is a cancellation right after ten years a common feature of gas purchase contracts, at least on the part of the producer?

Mr. Woods: Of course most contracts now are 20 year contracts.

Chairman Swidler: And do not have cancellation privileges at the end of ten?

Mr. Woods: I think that there are some that do, Mr. Chairman. I was trying to think of a really correct and frank answer to it. I think most of them are 20-year contracts that don't provide any carryover term. The posture of the industry has been such that until somewhat recently they assumed that when the contract terminated that ended the sale, but there are today 20-year contracts.

Chairman Swidler: This contract is unusual, then, having a

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ten-year cancellation?

Mr. Woods: I think so.

Commissioner Ross: Well, it is just a ten-year contract compared to a 20-year contract, isn't that the only difference?

Mr. Woods: That plus the fact that it carried an automatic continuation feature which could be canceled by either party.

Commissioner O'Connor: All of your contracts practically have the automatic continuation, don't they? Doesn't your standard contract have that automatic continuation on a month-to-month basis?

Mr. Woods: Mr. Commissioner, some of them do and some of them don't.

Commissioner Ross: But under Sunray even at the end of a 20-year contract the producer is going to have to continue to serve unless he gets permission to abandon, isn't he?

Mr. Woods: Yes, in Sunray that is what the Court held.

Commissioner Ross: Suppose you had a 20-year contract terminating at the end of 20 years, nothing said about termination. The producer is going to have to continue to serve. The producer could file unilaterally for a higher price, could he not, under a 20-year contract that is terminated?

Mr. Woods: That is the way I read Sunray, yes. Sunray told the producer this. It said, when you get through with your 20-year contract the Act imposes an obligation on you to

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continue delivering gas to the buyer if the buyer requests for it, and it said you aren't without protection under those circumstances, producer, you have no cause for complaint, because if the buyer wants the gas you have the right to name your price, as high as the Commission would allow.

So it recognized the protection of the higher price feature that the producer had, but the Court was very careful, Mr. Commissioner, to point out there that the buyer didn't have to take the gas as we read the case. It is only at the buyer's request.

Commissioner Black: Of course the Court there was not faced with the situation in which the buyer did not want the gas. This was exactly the opposite situation the Court had in Sunray; isn't that correct? The producer was seeking an abandonment which the purchaser resisted, so they weren't really faced with your problem?

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Mr. Woods: Excuse me, sir, they were as much faced with my problem as they were with the other problem. There wasn't any termination of the contract there involved. If you remember Sunray was just starting out. They were getting a certificate to begin sales that were going to last 20 years, and the Court was looking at the situation which would exist not then but 20 years down the line, and it was telling the Commission and the producers and the buyer who could do what under those circumstances in the future. It is dicta.

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This Commission pointed out that it was dicta, but what it was saying was this, it was saying to Sunray, you ask for a limited certificate here. You ask the Commission to tell you that at the end of 20 years you will be automatically free to stop these deliveries. We are telling you that the Commission does not have to give you a limited certificate. You had refused to give them one. You gave them a certificate without any time limitation. Then some extra things were said. Sunray says but that isn't right. You ought not to refuse to give us a limited certificate. Why? Because at the end of 20 years we will be in a position of inequality. We will be forced to sell our gas to United Gas Pipe Line Company, but United Gas Pipe Line Company won't be forced to buy it.

The Supreme Court said that is right, but it said you aren't without protection. You can at least raise the price of your gas as high as the Commission will allow, so that is your protection, and then it went ahead to say that at the end of 20 years if United doesn't buy this gas it may be found out that each party has its bargaining strength.

I think the answer to the situation of what happens, what the Supreme Court was saying would happen 20 years hence, if United doesn't buy the gas, doesn't need it, and

won't buy it at that higher price, then obviously this Commission ought to let the producer be rid of its certificate and not sell the gas, and free to sell it to another pipeline that wishes to buy it.

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As a matter of fact, that is what Commissioner Connole said in the Rutherford case. In the Rutherford case United once again buying from the producer and the contract ran out. The producer came to the Commission and asked for an abandonment, and the Commission said we will give you the abandonment.

Let me read this extract from Commissioner Connole's statement: "Dormancy is to be avoided as a matter of public policy in certificates of public convenience and necessity. To continue the certificate here would create a dormant certificate. Plainly it would be a vain act for we cannot compel the pipeline to purchase the gas and a certificate holder cannot be required to sell its gas if the buyer is unwilling to buy it."

Now, let me very briefly in a few more minutes turn to some other features of United's argument.

Commissioner Ross: Could I ask you one question before you get started on that?

You have facilities that aren't being used presently; isn't that true?

Mr. Woods: Yes, sir.

Commissioner Ross: You had to get a certificate to put those facilities—for getting whether you got one or not, but presumably if you were putting the same facilities in tomorrow you would ask for a certificate, wouldn't you?

Mr. Woods: These are field facilities. We didn't get a certificate to build the facilities. Whether we have to have a

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certificate to build field facilities is open to question.

Commissioner Ross: When you tap on to a line to take additional gas don't you have to get a certificate?

Mr. Woods: We do now ask for a certificate to cut a hole in our line, that is right.

Commissioner Ross: If you have to have a certificate to put them in don't you have to have a certificate to take them out or not use them?

Mr. Woods: I wouldn't argue with that at all. Our facilities are still there.

Commissioner Ross: Haven't you abandoned them?

Mr. Woods: No, sir; they are right there, they are in the ground.

Commissioner Ross: You aren't using them, though.

Mr. Woods: Do you mean we aren't running gas through them? No. But we could tonight if it got cold enough in Beaumont to need the gas.

Commissioner Ross: If you stopped serving a distributor don't you think the common parlance would be you would abandon the service—if you turned the valve off to that distributor what would he say? He would say you are abandoning service.

Mr. Woods: The Commissioner is going on to another point about service, is service buying Continental's gas? I would agree with you, if we stopped service to a distributor we would have abandoned service, and we can't do it without your

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permission and don't intend to. But here we are not rendering any service to Continental. We have no certificate to buy gas from Continental. We probably—I mean to build field facilities admittedly there ought to be a certificate, I assume that there should be a certificate to

build field facilities. We still aren't rendering any service to Continental.

The point I make is this: To begin with, this Commission's show cause order said to United, show cause why you should not have applied to this Commission before ceasing the operation. That was the point, the operation of these facilities. Well, the first and short answer to it is that section 7(b) is the section that deals with abandonment. The word "operation" is not even in section 7. Section (b) refers to two things, the abandonment of facilities and the termination of service.

Now, insofar as our facilities are concerned, we don't think we have abandoned them. They are there, they are physically present. They are operational. We could use them tonight if we needed this gas in Beaumont. We could use them tomorrow morning, and if it gets cold enough and we need this gas we probably will, but we haven't abandoned them. They are right there.

Commissioner Ross: Meanwhile Continental has to sit there and hold its gas available to you to take when you wish?

Mr. Woods: Not necessarily so, Your Honor. They have said that we have to agree to something. We have said we aren't going to agree to the price. Now, it may very well be

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that Continental, if it loses this case, will come back to us and say, now, what price did you say you were willing to pay us. They don't have to hold this gas. They can sell it to us.

The point is, I think the Commission sees in this thing some overriding public interest. This is really an argument between Continental and United about what we are going to pay for the gas, and whether we need it under the circumstances. Continental is saying, well, we will make

you pay the highest price the Commission allows. We say the Natural Gas Act just doesn't give you that much autohrity over us. They don't have to hold their gas in the ground. They don't have to suffer drainage. We have offered them an outlet. We are available to be talked to about contracts. I think that really is the most important thing in this case.

I am afraid this Commission sees some overriding public interest in this thing that United is in some way depriving the public of gas. That isn't the case. United is in the gas business to stay. It has been there over 40 years. It is going to deliver its customers every foot of gas they want, and we can get to them, as long as we can buy it and make a reasonable return on our facilities.

The only question here is whether Continental can force us to pay a price that we aren't willing to pay.

Commissioner Woodward: Can't they sell this gas to anyone else now? Couldn't they make a contract right now with

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Transcontinental or anybody else?

Mr. Woods: We think they could. We think they could come to this Commission.

Commissioner Woodward: If they have a market right now, or they had a market two days after the contract expired on January 21, isn't it your position that they could have sold that to anyone else?

Mr. Woods: Yes, sir.

Commissioner Woodward: Either intrastate or interstate?

Mr. Woods: Any deal they could make. We have said we would come to this Commission and tell you that we don't now need this gas, and we aren't willing to pay the price, and we think we can buy it cheaper some place else, and under those circumstances we ask you and solicit your

assistance in letting Continental loose out of this situation. Now, they have those rights.

Commissioner O'Connor: Would you support all of the producers that are connected to you where they have had prices rolled back to less than their contract prices, would you support abandonment before the Commission?

Mr. Woods: Mr. Commissioner, I don't see really how that bears on this problem. Those producers are getting the highest price this Commission will allow.

Commissioner O'Connor: It is different from their contract price, however.

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Mr. Woods: That is right.

Commissioner O'Connor: It seems to me you are putting the concept of the Sunray thing in circumstances that aren't applicable today. It seems to me that as a matter of fact anybody having a 20-year contract, at the end of the 20 years you don't have much other choice than to stay with your present purchasers unless you have got a very good field so that your present purchaser if he doesn't take the responsibility for continuing that through the depletion of the gas is in an extra bargaining position.

Now, in today's concept where the Commission in the public interest is rolling prices back and reducing them to lesser amounts than you contracted for, it seems to me that you may well have a moral responsibility to give a higher price than the best bargaining price you can get.

Mr. Woods: Well, we have not suggested that we want to back out on our contracts.

Commissioner O'Connor: You are not backing out on your contracts, but you are talking about them being able to come and bargain for price.

Mr. Woods: Well, you see, sir, there is no contract here. They canceled the contract. We don't think that they are in any position of inequality or inequity. They canceled

the contract, calculating that they could get a higher price out of us, and when they couldn't get us to agree to it, they said,

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we are going to force you to do it, and the real question is whether this Commission will lend its assistance to forcing——

Commissioner O'Connor: You made the statement a little while ago that a producer at the end of the 20 years is in an equal bargaining position because he can take his gas some place else if you don't want it. As a practical matter, a producer cannot take his gas any place else, after 20 years' production in which I would say 90 percent of the wells you are connected to, because he doesn't have enough gas left to make it an attractive enough package for somebody else to come in and attach to it.

Mr. Woods: Well, you are speaking about the practical consequences of who has the better bargaining position.

Commissioner O'Connor: Yes, you indicated you thought the bargaining position was equal at the end of the contract period. It may be. I am not arguing about this one, but in 95 percent of the cases there is no bargaining position at the end of the contract period.

Mr. Woods: Well, you are talking about practicalities of who has the stronger bargaining hand, and that perhaps is really what we are talking about in this case, but I don't think that changes the law in the matter. Whether the bargaining strength is equal or not is part of what we are talking about. Continental says it is going to take all of United's bargaining strength away and it is going to get the Commission's assistance

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in doing so.

Commissioner O'Connor: Our problem is here when your bargaining strength was weak, we threw the power of the

Federal Power Commission on your side. Now, should we throw the power of the Federal Power Commission on the other fellow's side at the end of the contract period when his position is weak?

Mr. Woods: We have always felt that those lower prices were in the public's interest. If that was required, it wasn't the pipeline that went back to its contract.

Let me make two other points here very quickly, because my time is running out.

First of all, we say that if there is anything in the Natural Gas Act that would compel a buyer to buy under terms unilaterally fixed by a producer over the buyer's objection, that it would obviously be inequitable and more than that it would be unconstitutional.

I realize this Commission doesn't really address itself to constitutional problems, but I think you ought to realize that we are advancing this proposition. The difference between Continental in these circumstances and United is this: If Continental is forced to sell its gas to us, then it has got the highest price this Commission will allow, and it has a guaranteed price, and it has a guaranteed market. It has a market for its gas. That isn't true of United Gas Pipe Line Company. United doesn't have either a market or a guaranteed

price for its gas, and I think that is something this Commission has perhaps overlooked.

Let me make this very clear: We are in competition with this gentleman's company right here for markets in Texas and Louisiana. We are in competition with producers, for markets in Texas and Louisiana. And those producers have quite often undersold us for those markets down there.

We have recently, as this Commission will recall, complained to you that Humble Oil & Refinery Company had

come in and undersold us at Tyler, had taken our market away from us. We asked your assistance. We were serving them under a certificate in interstate commerce. This Commission says we can't help you, we have no jurisdiction even to look into the matter.

Now, if that is the case, let me point out we have lost San Antonio down there to this sort of market raiding. We have lost Austin to this sort of market raiding. We have lost innumerable industrial sales that are larger than even some of these cities. We are in competition with this company down here for the very markets that we are presently serving in that area.

Now, if United has got to be in the position that its competition can tell it what it is going to pay for gas, and how much gas it is going to buy, and United has no bargaining strength in the matter, then we are in the position of having the competition fix a price, and then going in and underselling us.

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Now, we can't surrender. It is more than a matter of 14 cents or 10-cent gas. This is a matter of real principle with us. United has got to evaluate that competition. The Commission said it cannot. United has got to take the steps to combat that competition and live it it. This Commission says it cannot help us in those circumstances. We are going to do it, and our proposal is that we are going to incur the costs by contract, and that we are not going to be left in the position where the producer is going to tell us what we have got to pay for gas, and how much gas we have got to buy.

Let me mention one other point, finally, in passing. There is another reason why this Commission really cannot take the position that it is going to tell United it must buy this gas. If it did that it would then have to prescribe

all the terms on which we have got to buy this gas. For example, how much gas would United have to buy? Does this Commission have power to tell us how much we have got to buy on a daily basis?

A still more important question is what kind of delivery capacity, what volumes must Continental maintain. That is largely up to Continental in its drilling program, and its workover programs. Must it maintain a hundred percent of some maximum day that you tell us to buy or must it maintain 150 percent of that maximum day or is Continental to be left free and happy in the circumstances of doing just what it wishes? In other words, the Commission ought to take cognizance of the fact that if it

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goes to telling us that we must buy that, then it must enter into a field of in effect making contracts for us, telling us how much we must buy, when we must buy it, and it must prescribe the measurement terms, who is going to dehydrate the gas, who is going to process the gas, and the point is we say that the Natural Gas Act does not give you that authority. You have never exercised it. You don't have the authority to do those things, and that is but another reason why the Commission should not undertake to force United to buy gas here and to give to Continental the extremely powerful bargaining position that it sees possible for it to obtain if this comes out successfully to it.

Thank you.

Chairman Swidler: Mr. Woods, you have ten minutes for rebuttal, and may I say that there is no inference to be drawn from a show-cause order except that the Commission is presented with a problem that requires resolution on a record.

Mr. Woods: Thank you, sir.

ORAL ARGUMENT OF BRUCE R. MERRILL

Mr. Merrill: Mr. Chairman, members of his Honorable Commission, my name is Bruce Merrill, I represent Continental Oil Company.

At the outset a little attention needs to be given to clarifying the facts. The Johnson Bayou field is both an oil field and a gas field. There are some 17 or 18 oilwells in the

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Johnson Bayou field, two of which are on Continental's 160 acre lease. There are nine gas wells in the Johnson Bayou field, two of which are located on Continental's 160 acre lease. There is at least one oil reservoir. There are nine gas reservoirs. Continental's one well is a one reservoir completion, the other well is completed in two reservoirs. Continental's 160 acres is on the flank or the edge of the Johnson Bayou field, off center and off the best portion of the structure.

Transcontinental Gas Pipe Line Company buys from the other producers in the Johnson Bayou field.

Under Continental's 160 acres there remains approximately six billion cubic feet of gas recoverable reserves. Mr. Woods seemed to take the position that Continental would be free to sell their gas elsewhere at the conclusion of its contract. We would be very happy if this were the law, but we read the requirements of the Natural Gas Act to state that before we can discontinue this sale and service which is made pursuant to a permanently issued certificate, that we must first secure abandonment from the Commission. Therefore, at the termination of a contract, whether it terminates automatically or it is terminated by either party under an option to do so, as in this case, before Continental can seek another market it must first secure abandonment from the Commission. That is

the bargaining position about which any producer, and Continental in this instance, objects.

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Now, this Johnson Bayou contract was for a specific term of ten years. It was in the nature of a distress sale, and that is the reason for the ten-year term rather than a longer term. It is the reason for the less than nine-cent price rather than a higher price.

Commissioner O'Connor: What is Transcontinental paying for the gas?

Mr. Merrill: Twenty cents, I believe, Your Honor.

Now, the negotiations were not as simple as United would indicate that they were in their argument. Actually, there was a period of several months before the end of that contract in which Continental endeavored to seek a new contract with United. We did not spell out and dictate the terms. We attempted to negotiate for a different and new contract, either amendment to extend that contract or for a new contract.

We did make an offer, a specific offer, in which we offered to sell this gas under a new 20-year contract, with these step escalations, as counsel Woods indicated, and at 15.75 cents per Mcf, including one and three-quarters cents tax reimbursement, but the difficulty has been throughout that United declined to negotiate or bargain with us at all. They said from the very beginning, and never budged from it one time, that they would pay nothing but 8.99 cents per Mcf, and that was it. That, of course, is what led to our unilateral action here.

Commissioner Ross: Did you try to sell your gas to

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Transco?

Mr. Merrill: We certainly did, Mr. Commissioner. We assumed that if we could have gotten a market there we

would have applied for an abandoment, but Transcontinental said that they were unable to take any gas from us for at least two years. Now, that would put it over until 1965 before they could commence any deliveries.

In the meantime, of course, Continental is being drained. It has been drained 24 hours a day ever since that valve was shut off. It is not only drained in the two sands in which those wells are completed, but it is drained in the other seven sands as well.

Commissioner Ross: At what price did you offer to sell to Transco?

Mr. Merrill: Of course we were asking for the same thing they were paying the other companies in the field, which as I recollect is 20 cents plus tax reimbursement. That was, of course, prior to these amendments to the policy statement price.

Commissioner Woodward: Well, after the cancellation did you or have you so far sought an abandonment?

Mr. Merrill: No, Your Honor.

Commissioner Woodward: You have not yet?

Mr. Merrill: We have not sought an abandonment, that is correct. We felt that under the circumstances, not having another

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market available to us, and not being able to reach an agreement with United, that the best answer for Continental was to file for——

Commissioner Woodward: Well, you say no other market available. You just said you are going to sell it to Transco, that must be a market, isn't it? That is a market that is available, isn't it?

How many miles is it?

Mr. Merrill: Well, Commissioner Woodward, it is not distance, the fact is we tried to get that market and Trans-

continental said it would not and could not contract with us on any basis that would require them to take any gas whatsoever from us prior to 1965, so that we had maybe a future market in Transco, but we had no present market in Transco.

These facts are in the transcript, and in the record.

Commissioner O'Connor: Do the six billion reserves include all the gas behind the pipe or——

Mr. Merrill: Those are the total reserves in the nine sands under the 160 acres.

Now, I would like to spend a minute or two to try to impress upon the Commission the importance of this case. This is no single one shot controversy between Continental and United over price. The facts are that practically all interstate gas contracts are for 20 years, and are either automatically terminated at the end of 20 years, or have an option on the part of each

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party to terminate and give notice of termination at the end of 20 years.

Now, most of the contracts were entered into after the war with the big expansion in the pipeline industry. All those late 1949 and 1950 contracts are going to be terminated, either automatically or by the election of either the seller or the buyer under those contracts in the late sixties, and throughout the seventies. When they do, if either party has the right to cease and desist either the sale or the purchase, so that that gas does not move any longer into interstate commerce to the customers, and none of that gas has been served, then a very large portion of the reserve claimed by pipelines is not actually going to be available to the consumers who think they can rely on that type reserve.

It is quite likely that as much as 20 percent of all reserves could be sealed off from the interstate market if

there was a consistent and persistent enough exercise of this discretion that United claims it has, and which we say is reposed in this Commission.

These consumers, both the distributing companies and industrial consumers, and the ultimate domestic consumers, in many cases have made substantial investments in pipelines distributing equipment and in appliances for heating and other producer use. In installing and making those invsetments they relied upon the gas reserves that United has claimed that it has

available to supply them over the years under their contracts. Now, United says that they have the option, and they have the right, and they have the discretion to take away from these consumers a portion of that gas on the happenstance of the ending of a contract. These very self same reserves—that means all of the recoverable reserves at Johnson Bayou and elsewhere, are the very reserves that United came before this Commission and told this Commission they had available to support their pipeline or expansion certificate.

Now, taking a look at the impact on the producer, if the producer winds up at the end of his contract with a substantial amount of reserves, an amount of reserves which it is economical to continue to produce, he has no contract, he is required under the Act to continue to deliver gas under his permanent certificate to the pipeline he has been serving, and the pipeline is not similarly bound to take this gas or to transport it in interstate commerce, or to deliver it and sell it to its customers, then that gas may sit in the ground indefinitely. Certainly he has no revenue that he can look to with any continuity. His financial integrity and that of the industry is going to be impaired if that option rests with the purchaser, and finally

and certainly not least of importance, he is undoubtedly going to lose his leases because under every oil and gas lease that I have ever seen there is a requirement that once production has been commenced that it can be terminated only for a period of

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some—usually it is 90 days, sometimes 60 days. That is all they allow you to terminate. If you go beyond that time you have forfeited your lease.

These particular leases, or, rather, this one particular lease is held by the production of oil. If it were not for that oil production the lessor would undoubtedly have already brought action against Continental to cause the forfeiture of the lease because it has been shut off, and not producing any gas for over a year.

Commissioner O'Connor: You are flaring the gas there; is that right?

Mr. Merrill: I assume it is either being flared or returned to the formation, Mr. Commissioner.

Commissioner Ross: Well, in answer to Mr. Woods, what other conditions of the contract are effective? You say you want 15.75. What are going to be the take or pay obligations; what are going to be your pressure and daily delivery?

Mr. Merrill: Commissioner Ross, my position is, and I believe it to be a correct one, that at the termination of the contract there is several things that did not terminate. One of the things that did not terminate was our permanent certificate. Another thing that did not terminate was our rate schedule. The only thing that was left open—and this is a question of trying to do equity in my opinion, was under those circumstances, and whether or not it is in the contract, it was

only fair to permit a seller to file for a unilateral increase absent agreed price under a contract that has been going on for ten or twenty years, and the market situation may have completely changed in that time. That does not mean that the seller is without his remedies, because United certainly has its remedies under those circumstances here.

First of all, it can contest the unilateral rate increase. Second of all, it can apply for an abandonment itself. Those are two remedies it has right there itself, so it is not helpless and without bargaining position. We don't ask for this Commission to shift the bargaining position from in favor of the pipeline to in favor of the producer. We ask only equality and if both parties must seek abandonment before this type of service can be terminated, then equality is done, and our bargaining position is equal.

There are some things that have been raised in this proceeding of many pleadings, many briefs, which to me seem to obscure the issue.

Chairman Swidler: Let me ask you, you say that United could contest the price. What kind of case could it make against any price that was within the ceiling?

Mr. Merrill: Mr. Chairman, I do not know, and I do not foresee precisely what arguments or what proof they might adduce other than the area price. There may be questions of difference in supply. There may be things that might make this particular

gas less valuable to them than some other gas. The arguments I don't know. The proof might be different.

Chairman Swidler: Well, this seems to me to be a fairly important question. Mr. Woods stressed the fact that if we were to sustain your position, the pipeline would be left with no bargaining position, and it would have to pay any-

thing that the producer wanted to charge within, of course, the ceiling.

Now, have you any comment on that, beyond what you have already said?

Mr. Merrill: Yes, I do. It is a 4(e) increase, like any increase under 4(e), this Commission has not only the right but the responsibility to review those rate increases. If the Commission on its own or at the instance of United should deem it necessary to suspend the rate and set it down for hearing, then the burden of proof as to the justification of that rate, and the proof that it is a just and reasonable rate, is upon Continental. We either have to sustain it and get this Commission to agree that it is a just and reasonable price, or we don't get it.

The irrelevancy which has crept in——

Chairman Swidler: Under an area rate pattern would that be effective as a means of limiting the price to any figure lower than the ceiling?

Mr. Merrill: Well, the area pattern means different things to different people, Mr. Chairman. To me it means the

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ceiling, and either the contract might place a limitation below the ceiling, or this Commission, for certain specified reasons applicable to a particular sale, would have the power to set a rate at less than the ceiling.

Commissioner O'Connor: We could set a rate at less than the ceiling if it wasn't the same type of gas that the ceiling was set for.

Mr. Merrill: I think that the area rate will be a ceiling, an upward limitation, and many factors or circumstances might result in any particular sale being made at a rate less than that. That is my view of the area rate.

The irrelevancies are that United's need for this gas, or whether or not United is continuing to serve its customers

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generally, whether or not it is in a take or pay position in South Louisiana, are all irrelevant to the question here before this Commission, and that is whether United must seek an abandonment before it can cease using these facilities and performing the services rendered thereby.

There are certain non-controverted fundamentals, such as the fact that these are jurisdictional facilities, that this is a jurisdictional transmission, jurisdictional resale. Those things were established, the fact that United cannot abandon jurisdictional facilities or a jurisdictional sale was established as far back as 1942, in a case reported at 3 FPC 3.

Another irrelevancy is the fact that United has consistently

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refused to understand or state that they understand that the contract is dead, that the service that is being performed now or should be performed now is one that must be performed pursuant to the Act, not pursuant to the contract. The Act supersedes the contract.

Commissioner Woodward: When does that happen? That little slight distinction that they are trying to make now, when does the contract stop, and when does the Act take over, exactly?

Mr. Merrill: Commissioner Woodward, if I may express my opinion on that, it is an instantaneous happening, and it happens at the instant the contract terminates, however the contract may be terminated, either whether it is by automatic provision or by the termination under an option held by either party.

Also, I think there has been a big smoke screen laid down by United as to under what terms and conditions this sale may be permitted. Now, it is going to be permitted obviously and of necessity under the terms of the rate schedule. If there are any terms in there which no longer

proper or just or reasonable, or in the public interest, I believe that this Commission has the power under section 5 of the Act to modify those terms and provisions, and if there are any such conditions I am sure that United will bring them up. They have operated for ten years under the terms of that rate schedule. I don't see any reason why they cannot continue to operate under

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those circumstances. The only terms that have been changed are the rate, and that is a change that has been recognized by the courts in the interest of equity.

Chairman Swidler: Well, on your theory, however, wouldn't you be able to present an entirely new contract to United and say this is it, unless the Commission changes it.

Mr. Merrill: I believe it is possible, Mr. Chairman, for a producer under these circumstances to file a complete tariff rather than a simple supplement to his existing rate schedule in the form of a unilateral change in rate. If so, I think it would then become the Commission's duty to review the entire tariff rather than just the rate.

Now, the Examiner, unfortunately, adopted or subscribed to the position that United has advanced here. I believe that the Examiner's finding that Continental must sit here for an indefinite period of time with this six billion cubic feet of gas shut in at the disposal of United on a delivery if, as, and when United may ask for it, is so obviously inequitable and unjust on its face as to require little argument.

I would like to focus attention for a moment on section 7(b) of the Act. That is the section which requires any natural gas company—I emphasize that, because it dosen't say any seller of natural gas in this section, it says any natural gas company must seek and obtain from this Commission authority to abandon any facilities, not all facilities, but any facility

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that is a jurisdictional facility or any service, not all and ultimate service, but any service rendered by means of those facilities.

Now, that is just as broad and sweeping a power laid down as section 1(b) of the Act, which confers jurisdiction on this Commission. Unlike section 7(a), (c), and (e), where the emphasis and the wordage is on sales and selling, the language in section 7(b) is much broader than that. It says any natural gas company, any facility, any service. It was obviously the intent of the Congress to make it just that wide and that broad, because the legislative history, as pointed out in Staff Counsel's able brief, there the very thing United contends for here was submitted by an attorney who was representing the pipelines. That contention was rejected, and in lieu thereof this broad sweeping jurisdictional power over abandonment was given to the Commission over any natural gas company, not just the seller.

United refers to three court cases and one Commission case to support its contentions. Mobile and Memphis were not concerned with abandonment at all. They were not even concerned with the obligation to purchase. Mobile deals with one way to make initial sales to prospective customers, and one way to make sales to particular customers. Mobile deals with contract limitations to unilaterally increased rates during the contract, not after termination. Memphis deals with the right to make unilateral increases absent the contract limitations but during

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the contract. Neither are important in the issues raised here. Sunray establishes the fact that the Act takes over at the end of the contract, and that section 7(b) is operative after the contract termination as well as during the life

of the contract. Sunray recognizes the overriding service, over and above contract performance. This is the service that United says they are continuing to perform but they have taken away a portion of their ability to perform that service indefinitely.

Sunray established the right to file unilateral increase after contract termination. Sunray spelled out the intention of the Act to be a comprehensive and effective regulatory scheme in the consumer's interest. Sunray did not distinguish between a buyer and a seller so far as section 7(b) requirement is concerned.

None of these cases are direct authorities for the present issue. This is an issue of first impression. None of these cases dealt with that.

Commissioner Connole's concurrent opinion in the P. R. Rutherford case, is directly overruled by the Sunray case. What would be the consequence of giving legal effect to Sunray's contention that it need not seek abandonment, and what it has done does not constitute abandonment.

I have already touched on the fact that the consumers, the distributors, and so forth, have their investment, their reliance, and their dependence upon United's continuing supply

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of natural gas. I have pointed out the producer is certainly in a pickle like we are, he is going to lose his lease, his revenue, he is not going to have the money to spend to bring more gas to market. The Commission has a big hole shot in its jurisdictional pattern if United has the discretion over abandonment rather than this Commission.

Suppose, for example, over United's argument that Continental had sought abandonment here, and suppose this Commission said it is not in the present or future public convenience and necessity to permit this abandonment, you have to perform a service, you have to keep delivering

and selling this gas to United. Under United's contention they still are sitting there with an option to either take it or not take it, or walk off and forget those facilities if ever they choose to. That is the very kind of gap in this comprehensive regulatory scheme which would make it very ineffective rather than effective.

United apparently thinks that these small amounts of facilities don't amount to much. According to this record, the entire supply of the Mud Lake line, the 16-inch Mud Lake line, is the Socony Mobil sale from the Mud Lake field, and the Continental sale from the Johnson Bayou field. Would United's intention be the same if this was an instance where Mobil had sought to file a unilateral rate increase at the end of the contract, and had filed a unilateral increase? Would United say we can shut down

the Mud Lake field and we can still serve Beaumont from South Texas? Would they say that they can just immediately shut off that entire 16-inch line that runs from Louisiana across the State line and over into the Beaumont area?

I think it is pretty obvious that the size of the facility can be pretty large under these circumstances, too, where a large facility is served from a single supply of gas.

Now, I have stated that United is not without its remedies. I have stated that up to a point. I would also like to add one and that point is that there is a 7 percent interest which attaches to our unilateral rate increase. Believe me, that is an effective deterrent. I thought long and hard before I wrote down the 14 cents plus tax reimbursement for the rate increase involved here. As it turned out, it hasn't made any difference because 7 percent of nothing is still nothing.

Chairman Swidler: We will take a break at this time.

(Whereupon, at 11:20 a.m., a recess was taken until 11:34 a.m. of the same day.)

Chairman Swidler: Staff Counsel.

ORAL ARGUMENT OF C. LOUIS KNIGHT

Mr. Knight: Mr. Chairman and members of the Commission, my name is Louis Knight, and I am the Commission Staff Counsel.

It is the Staff's position in this case that the rights and duties of United in the situation in which it found itself in

January, 1963, were determined and are determined by the Natural Gas Act. It is further the Staff position that when United ceased to operate the facilities which it had operated to receive gas from Continental to purchase that gas, that it abandoned those facilities and the services which had been rendered by them, also that those facilities were subject to the jurisdiction of the Commission, and that section 7(b) of the Natural Gas Act required that United apply to and obtain from the Commission permission and approval before ceasing the operation of those facilities, and, further, that United has not shown good cause as required by the Commission's order as to why it should not obtain the Commission's approval for ceasing the operation of those facilities.

First, I would like to point out the facilities which are directly involved here. United's facilities consist of the facilities south of the valve here. There is well No. 1 and well No. 2.

Commissioner Ross: That is Continental's.

Commissioner Woodward: These are Continental's facilities, aren't they?

Mr. Knight: Yes, Continental's. Continental has completed two wells in the Johnson Bayou field. The gas flows

up through Continental's two and a half inch flow line, through a valve into United's four-inch line, through a separator and meter, and into the Mud Lake line of United, where it is mingled

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with other gas going to the Beaumont, Texas, area. There are about 4400 feet of Continental's two and a half inch line, and 55 feet of United's four-inch line.

I have been informed that I put the meter and separator in the wrong place, that they ought to be down here closer to the valve than they are.

Now, on January 31, 1963, that valve was closed and for over a year United's facilities have not been used, that is the 55 feet of four-inch line, and the meter and the separator.

I think the first thing we ought to determine is whether or not the cessation of the operation of those facilities constitutes abandonment. In that regard the Staff finds itself in disagreement with the position taken by United, and also with the view expressed by the Examiner. Both United and the Examiner seem to base their view that the cessation of operation of those facilities does not constitute abandonment on just one test, namely, they say that the facilities are still in place and can be used at any time.

I submit that that is not a sufficient test of abandonment. In one specific instance, a few years ago, the Texas Gas Transmission Corporation applied for and received permission to abandon a large pipeline running from Baytown, Texas, to Moundsville, W. Va., as a natural gas pipeline. That was in 1956, the city of Pittsburgh case.

Commissioner O'Connor: Was that Texas Gas Transmission

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or Texas Eastern?

Mr. Knight: Texas Eastern.

That line is still in place. It is still being used, however, for the transportation of petroleum products instead of natural gas.

Chairman Swidler: It is no longer available for the transportation of natural gas, is it?

Mr. Knight: Not unless it ceases transportation of petroleum.

Commissioner O'Connor: Or a war emergency.

Mr. Knight: Yes.

I merely cite that to show that the test of the facilities being left in place is not a sufficient test on which to base a conclusion as to whether or not there has been abandonment. This is only a four-inch line, and it might well be that the salvage value of those facilities would not make it worth while to take them up out of the ground.

I submit we have to apply other tests. One of those tests is to apply the words of the Act to the facts of this case. Now, the Act says that no natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission or any service rendered by those facilities without the permission and approval of the Commission first had and obtained.

Now, there is no question about those facilities being

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subject to the Commission's jurisdiction. That has not been questioned at all. Whether or not the cessation of operations over those facilities constitutes abandonment, we will have to find out what abandonment means in ordinary parlance because that is the sense in which Congress used the word in its statutory language.

Chairman Swidler: Why do you say that?

Mr. Knight: Sir?

Chairman Swidler: Why do you say that?

Mr. Knight: It seems to be a cardinal rule of statutory construction that unless it is indicated otherwise the language of a statute is to be taken in its common ordinary meaning, unless there is some special definition of the language or some ambiguity in it.

Chairman Swidler: A technical word like abandonment would be used in the light of its legal meaning, wouldn't it, not the man on the street's meaning, but the meaning attributed by the cases?

Mr. Knight: Well, that, of course, would probably be a matter of interpretation by the Commission.

Now, as Staff Counsel I have interpreted abandonment in this sense to have been used in the common ordinary sense of abandonment.

Chairman Swidler: Well, there are probably hundreds of cases on the meaning of abandonment, as applied not only to this

situation but the abandonment of rights of way and I am sure that past interpretations would have been assimulated in the use of the word.

Mr. Knight: In just a moment I will come to the judicial interpretation of the word, Your Honor.

If we assume that in the Natural Gas Act Congress used the word "abandoned" in its common ordinary meaning, and looked at Webster's International Dictionary as to what that meaning is, we find that among the meanings given for the word "abandoned" is to cease to operate or to desist from using, or to permit to cease or lapse.

Now, if we assume that the word "abandon" in the Act was used in that sense, that it is commonly understood to be used, then there has been a cessation of operation of

these facilities which has lasted for more than year. Now, if that does not constitute abandonment, just how long would this cessation of operation have to continue in order to consider that these facilities are abandoned. That is the word test, the meaning of the word test.

Now, we come to the judicial interpretation of that word, and section 7(b) of the Natural Gas Act was patterned after a similar section in the Interstate Commerce Act, and similar propositions are found in many regulatory statutes. There is a provision in the Interstate Commerce Act, which forbids a railroad to abandon all or any part of its operations without the

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prior permission of the Interstate Commerce Commission, and I have cited in Staff's brief a number of cases in which that section in the Interstate Commerce Act has been interpreted by the courts. I think there are three or four cases cited in the brief, and the courts have interpreted that provision of the Interstate Commerce Act to mean cessation of operations by a railroad of any portion of its trackage or any of its facilities constitutes abandonment.

Commissioner Black: Cessation, doesn't that necessarily imply in the use of the word "abandonment," as it has been judicially construed, an intention to permanently rid yourself of the service and facilities? United argues that—I understood counsel to argue in any event that some day they might want to pick up this gas to meet an emergency situation, even at Continental's price. Does that fit in with the cases that have dealt with abandonment?

Mr. Knight: In those cases which I have cited in my brief, and in which the courts have interpreted the provision in the Interstate Commerce Act, to the best of my recollection the courts' decisions did not rest on the question of intention as to what was intended.

Chairman Swidler: Well, suppose that there had been a 30-day hiatus in which the parties bargained with each other, and after that they agreed on a price and resumed the operation of the line, would you say during that 30-day period there had been

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an abandonment?

Mr. Knight: I would say in all cases, Mr. Chairman, whether or not there is an abandonment would have to be decided in the light of all the facts and circumstances of the case.

Chairman Swidler: If you say that, the mere cessation is not enough.

Mr. Knight: That is right.

Chairman Swidler: It requires more.

Mr. Knight: You have to have more.

Chairman Swidler: It requires intention.

Mr. Knight: That is right.

Chairman Swidler: Very good.

Mr. Knight: We are coming now to this question of intention, but where there is a cessation of operations due to some breakage in the line or the necessity of repair or some other occasion, and it is intended to resume operations as soon as this emergency is taken care of, I would think it would be quite clear that there has not been any abandonment.

Commissioner Black: Under the facts of United's operation would you feel that it was inconceivable that United would ever want to go out and open that valve again?

Mr. Knight: I would not consider it inconceivable, but in the light of the facts in this case which are in evidence, it seems to me that they have no present intention of resuming the taking of gas from Continental, and I would like to refer to

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to a couple of exhibits.

Chairman Swidler: Well, do you question the statement that was made by Mr. Woods that they would be glad to take it at the old price?

Mr. Knight: I don't question that statement.

Chairman Swidler: Well, is that an abandonment?

Mr. Knight: I think it is, Your Honor. Under the facts of this case I think these facilities have been abandoned.

Chairman Swidler: That is willingness to take at 10 cents but not at 14 cents is abandonment?

Mr. Knight: I would say that is the case because the Commission has approved a higher price. The Commission has approved a price of approximately 15 cents for this gas, and there is no indication that the price at which United has expressed a willingness to take the gas will ever be realized.

Chairman Swidler: I didn't know that the Commission had approved a price for this gas. What do you mean by that?

Mr. Knight: When Continental in December of 1962, I believe it was, filed for an increase in price, United objected. The Commission nevertheless approved the price and permitted the higher rate to go into effect. United applied for re-hearing which the Commission denied, and the stage was at that point set for United to go into court and seek a court review if it was displaced with either the price or with the Commission's action.

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Commissioner Woodward: Well, that was merely the setting of a price, was it not?

Mr. Knight: The setting of a higher price.

Commissioner Woodward: In that order, as I remember it, we didn't say to whom that price was going to apply,

did we? We didn't say in that order it was going to apply to United?

Mr. Knight: I believe you did not.

Commissioner Woodward: No.

I would like to ask another question along this abandonment, as long as you are on it.

In reading the abandonment, in reading section 7(b) where it says there that no natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities—now, do you read those together or do you read them separately and separate them by a comma, in there?

Mr. Knight: I read them separated in the disjunctive, Mr. Commissioner.

Commissioner Woodward: Don't you have to read them both together?

Mr. Knight: I wouldn't think so. If Congress had meant to have those read together I believe it could have and would have used the word "and" instead of the word "or." It has used the disjunctive realiizng there could be an abandonment of service without abandonment of facilities. That is the point I

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wanted to come to if I have time when my time is up.

On this question of intent, my point is there have to be a number of tests applied to determine whether there is abandonment of facilities or services, and no one test in and of itself is sufficient to govern the circumstances of the case.

We come to the question of United's intention, and I think that intention is indicated clearly in the letter United wrote to Continental under the date of December 17, 1962, which is in evidence in this proceeding as Item C, by refer-

ence to the Commission's files. The letter was in a sense a response to Continental's letter of October 23, 1962, in which Continental had informed United that it intended to terminate the contract at the end of the primary term.

Now, on December 17, 1962, United Gas Pipe Line Company wrote to Continental and, among other things, it said in the third paragraph of that letter, and I quote, "As we discussed with you during our meeting of December 13, 1962, we have reviewed your recent contract proposal and we wish to advise that at this time we have no need for this gas because the gas supply now under contract to United is adequate to supply our present market requirements. Because of this condition, we also wish to advise that we intend to support your filing with the Federal Power Commission for abandonment of service."

Now, I want to emphasize the beginning of that second sentence, "Because of this condition." What was the condition, that

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United had all the gas it wanted and needed. Because of that condition it intended to support Continental's application for abandonment of service.

Continental has never filed for abandonment of service. To me that seems to indicate that United had at that time no intention of resuming the taking of this Johnson Bayou gas from Continental.

In a sense, stretching a point, we might refer to United's letter of December 17th here from which I have just quoted as part of the res gestae. It was a letter written before this dispute arose.

Now, that was a letter written back in December, 1962. I would like to refer to a letter written by United to Continental under date of January 28, 1963, as this dispute was coming to an end, and I quote the two last paragraphs of that letter, in which United said:

"This letter is to notify you that United Gas Pipe Line Company will discontinue the receipt of gas from Continental Oil Company in the Johnson Bayou field at 7 a.m. on January 31, 1963." In the event you should desire to continue to deliver gas under the provisions of the contracts we submitted to you on December 26, 1962, please advise us."

So there, again, you have a letter from United to Continental, on January 28, 1963, just three days before they turned the valve and cut off this flow of gas which to my way

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of interpreting it indicates certainly no intention on United's part to resume the taking of gas from Continental unless Continental comes around to the terms presented to it by United, and there is no indication that Continental has any intention of doing that, so as to the intention of United it seems to me that United's own letters here indicate that it does not intend to resume taking the gas from Continental from the Johnson Bayou field. It certainly does not indicate that they considered this merely a temporary thing, an emergency, and that they will resume taking it as soon as this emergency is over.

Now, that is the reason why the Staff considers that United abandoned the facilities which it had previously operated in taking this gas from Continental. Of course it has abandoned a service which was rendered by those facilities, namely, the transportation of gas in interstate commerce. That is what that line was doing, performing that service, and that service was subject to the jurisdiction of this Commission. So on both counts, the abandonment of facilities, and the abandonment of service——

Commissioner Woodward: Well, the abandonment of what I was going to get at before—the abandonment of

service was to whom, the abandonment of that 55 feet of line was abandonment of service to——

Mr. Knight: To United and through United to United's

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customers. United is a transmission pipeline.

Commissioner Woodward: I assumed that they didn't need the gas, so it would be an abandonment of service need the gas, so it wouldn't be an abandonment of service to the customers, it would be an abandonment of service to Continental, wouldn't it?

Mr. Knight: Abandonment by United of a service to its customers.

Now, it is true that United says its customers do not need that gas or, rather, that it does not need that gas in order to serve the needs of its customers. That, however, is a question which might properly be raised in an abandonment proceeding which this is not. This is not a proceeding in which the Commission is going to determine whether United shall be permitted to abandon. It is a proceeding as to the scope of the Commission's jurisdiction as to whether United can of its own free will determine whenever it sees fit that it will abandon.

Chairman Swidler: Mr. Knight, your time has expired. Have our questions prevented you from making the points you had intended to make? If so, I will allow you——

Mr. Knight: I might say, Mr. Examiner, I am always glad to have the questions, because they enable me to focus my remarks.

Chairman Swidler: But you have substantially made your remarks?

Mr. Knight: There is just one other point I wanted to

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bring out.

Chairman Swidler: Well, you may have two more minutes.

Mr. Knight: Thank you. I will not deal further with abandonment because I think under section 7(b) of the Act, United is required to come and get the Commission's permission to cease operation of those facilities, that this is a jurisdictional question.

If United is dissatisfied with the price which the Commission approved for Continental, it has its remedy to come in here and file an application to abandon those facilities and that service.

Now, the next point is one which has been raised recently by the decision of the Court of Appeals of the United States for the District of Columbia in its decision in the case of the Public Service Commission of the State of New York v. Federal Power Commission. Even in the absence of section 7(b), I believe that United is under an obligation to come to the Commission and get permission to abandon those facilities or to cease operation of those facilities, whichever we consider.

Now, I quote from that decision which was handed down on January 2, 1964, Judge Fahey wrote the opinion, and I quote from page 7, "All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with the unforeseen problems of administration in regulating this huge

industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies, and purposes of the Act, it may use means which are not in all respects spelled out in detail."

Now, in section 1(a) of the Act, Congress declared that federal regulation of matters relating to the transportation of natural gas in interstate commerce, and the sale of

natural gas in interstate commerce, is necessary in the public interest and in section 16 of the Act, Congress empowered the Commission to do any act and issue any order which it found necessary to effectuate the purposes of the Act.

I submit that the regulation of the cessation of operation of facilities by a purchaser of gas is just as necessary in the public interest and to carry out the purposes of the Act as is regulation of cessation of the sale because sale and purchase are the same transaction, they are just two sides of the same coin. There is a transfer of title from one party to another for a consideration. You cannot have a sale without having a purchase or a purchase without having a sale. The facilities which effectuate one also effectuate the other.

Chairman Swidler: Thank you, Mr. Knight.

Mr. Woods.

REBUTTAL ARGUMENT OF VERNON WOODS

Mr. Woods: Mr. Chairman, to be sure that the record is straight, United Gas Pipe Line Company did offer Continental a

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contract. It said to Continental "We will buy your gas, we will continue to buy, we are going to do it at the old contract price, and we will buy it from you from here on until you get an abandonment from the Commission." That is in the record. There is no question about that.

The difference and disagreement here is Continental says no, we won't sell it to you at that price, we are going to get a higher price. That is really what we are talking about , so that is all in the record. We did offer them a contract, and the offer is still outstanding.

Now, Staff Counsel raises the question about the interpretation of section 7(b) and he says that section 7(b) is patterned after section 118 of the Interstate Commerce

Act. I think the Commission has dealt very clearly with the question of intent and so forth, but Staff Counsel completely misinterprets the court decisions on what section 118 of the Interstate Commerce Act means, and I think it is important to set the record straight.

Admitting that section 7(b) was patterned after that section, section 118 of the Interstate Commerce Act has been interpreted consistently in the way United says section 7(b) ought to be interpreted, or to be more specific the Interstate Commerce Commission has never considered that it had any authority to tell a railroad that it could or could not change a given passenger train, for example, an interstate passenger train or

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that it could or could not change a schedule or could or could not take off a freight train.

Respectfully, my firm represents three railroads in the State of Louisiana, and I have tried many of those cases, and the Interstate Commerce Commission has never exercised jurisdiction under the almost identical language in the abandonment section unless the railroad was intent upon taking up its line of track and doing away completely with any possibility of any future trains going over that track, and that is precisely what we tell you is the situation here. We haven't taken up our line of track. Our track is still there, and we haven't said that we won't take the gas. We have said that we will take it at the contract price that we agreed on.

Commissioner Black: Do you mean if a railroad wanted to stop a particular train from operating that it wouldn't have to seek authority to abandon unless it tore up its track?

Mr. Woods: Yes, sir; does that come as a surprise? If the Kansas City Southern, which we represent, wants to take off its No. 1 passenger train which runs from Kansas

City to New Orleans, it can do so without ever telling the Interstate Commerce Commission one word about it except reporting it, and it can do it without Interstate Commerce Commission approval under almost an identical provision.

Commissioner Ross: But using another provision in the law, a service provision which they have to apply to— at least the

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States——

Commissioner Black: The State commission certainly——

Mr. Woods: Oh, yes, the State commissions have regulated the changes of schedules, not all. We could go to the Missouri Commission, the Arkansas Commission, and the Louisiana Commission and work on it independently if we wanted to take that train off.

When the Arkansas Commission said you can take it off, we would run the train to the Arkansas line, and back up to Kansas City, but the point is that the Interstate Commerce Act, just simply doesn't operate, as Staff Counsel says he interprets the court decisions to say. Therefore, section 7(b) doesn't give the Federal Power Commission the right to do anything other than—I mean it doesn't give it the right to supervise a change in these operations.

If we in this bargaining process here with Continental, if it takes us a year to get this matter settled before we get back this gas at either 14 cents or 10 cents, whatever it is, we haven't abandoned those facilities, they are still there, and if we need this gas tomorrow at Beaumont, United will take it.

Now, the fact of the matter is that we are buying gas over in Texas, and we have bought it at 13 cents that we can take into Beaumont, so why should we pay Continental 16 cents for it, and more than that, Your Honors. If this Commission fixes 19 cents for South Louisiana gas as the area rate and fixes one

price for it, there can be no doubt about what Continental will do. It is going to file the very next day for the 19-cent price.

Commissioner O'Connor: What are you paying Socony for the gas from the Mud Lake field?

Mr. Woods: I think we are paying 20 cents, Mr. Commissioner.

Commissioner O'Connor: Why don't you cut them off and take the 13-cent gas?

Mr. Woods: Because we have a contract that tells us what we must do, and we are going to live up to that contract, and if we had a contract with these gentlemen we would live up to it. They canceled the contract I want the Commission to know. We didn't cancel it. They are the ones that—they took a calculated risk. They thought they saw here a situation where the Natural Gas Act would put them in a position where they would have the complete upper hand, and that they could take away every bit of the pipeline's bargaining strength. Well, the Natural Gas Act just wasn't intended to do that, that is what it amounts to. If there is any continuity of service that is required, if we have got to run gas through those facilities, then we respectfully say the Natural Gas Act doesn't give one party to that transaction such an overwhelming right over the other.

It doesn't say that Continental or the producer has the right to name the price it will take, and the conditions on which

it will sell and the other party must just simply sit idly by and do nothing.

Commissioner Black: How do you answer Mr. Merrill's argument that the reserves that United utilized when it got certificated are reserves that the distributors and the con-

sumers are entitled to rely upon, that may affect their financing, and so on, there is any response to that?

Mr. Woods: Yes, sir; I would answer that in this way, those reserves are still there, and they are still available to us. There is nothing—they are available to us today if we want them. The point is——

Commissioner Black: Do you reasonably anticipate that you will ever use them?

Mr. Woods: Well, I frankly don't know the answer to that. Obviously if we need the gas in Beaumont at any particular time, and we can't get it there cheaper, we are going to take it. That I can state to you for sure. United is not going to let any of its customers go without gas, and if it needs Johnson Bayou field gas to supply Beaumont, it will take it, and it will pay the price Continental has filed, but so long as we can do it more economically, then we are going to do that, too.

Commissioner Black: If what you have done were interpreted as an abandonment would you say that this 7(b) does or does not apply to a pipeline purchaser?

Mr. Woods: I think it is clear, Mr. Commissioner, that it

does not apply to the purchase of gas. First of all, section 7(b) doesn't talk about abandoning a purchase. You don't even issue a certificate, Your Honor, to a pipeline to purchase gas. You don't issue a certificate to any purchaser. This Commission's certificate authority exists only to authorize the sale of gas. When we get ready to sell gas to Tyler, Texas, or some place, you authorize us to sell it and you authorize us to build facilities, but you don't authorize anybody to buy gas. For example, United just have recently sold an additional 50 million feet a day to Mississippi River Fuel. We came up here and put on evidence and asked for a certificate to sell to Mississippi River Fuel. Mississippi River Fuel intervened in the case, and

it was set for hearing. It didn't ask for any certificate. It didn't get one from the Commission, and it is taking that gas today.

The point is that section 7(b) is no broader than your certificate authority, and you don't issue certificates to purchasers. Service as used in section 7(b) has always been intended to mean service to the purchaser. That is what the solicitor general told the Supreme Court in the Sunray case. The Examiner quoted the solicitor general's representations to the Supreme Court in deciding this case, and the solicitor general said—and it is in the Examiner's decision, to the Supreme Court, in his brief, that service as used in section 7(b) is and has always been interpreted to mean the furnishing of gas

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to the purchaser.

Commissioner Ross: In other words, you are saying that as a matter of law, the 16-inch line is not a part of your system?

Mr. Woods: Yes, sir; the 16-inch line.

Commissioner Ross: The four-inch line?

Mr. Woods: It is part of our system, yes.

Commissioner Ross: Part of your transmission system?

Mr. Woods: The 16 is transmission, the four-inch is field line. I don't know what difference that makes here.

Commissioner Ross: And you can go ahead and build as many four-inch lines as you want, make as many taps to your 16-inch line as you want, without getting our approval?

Mr. Woods: No, sir; I haven't said that at all, sir, but I will say this, and it is done time and time again. If there is another producer in the Johnson Bayou field that wants to sell us gas, and we have done this many times, all that we have to do is to get a facility to tie it into our valves. I am not saying we don't have to get a certificate to build these lines, we do—I say we do, we don't think we

do, but I am saying we don't have a certificate to buy. I don't think we have abandoned anything, and I trust that this comes as no surprise because this is what the Commission has always done. You have never given a certificate to purchase gas, and the reason is because the purchasing of gas is not considered a service.

Commissioner Ross: We have given certificates for facilities

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through which you purchase gas.

Mr. Woods: You have given us certificates for facilities used to purchase gas, and used to transport to customers, that is correct, and those facilities are there, and we can use them tonight if we need to or tomorrow, and we can use them if Continental accepts our offer of an old contract, so we haven't abandoned them.

Commissioner Ross: Well, if you are willing to support Continental in a position by Continental to abandon, what is the objection, why don't you just come in and say we will abandon?

Mr. Woods: Well, first of all, do we have to buy in the meantime? Do we have to accede to their wishes? The point is, the Act just isn't organized in that way. We have no certificate to abandon. We don't want to abandon these facilities under these circumstances. We still may get this gas at 10 cents, or 11 cents, 12 cents, we may get it cheaper than the 19 cents the Commission may approve in South Louisiana, but the point is why should we be forced to do it?

Commissioner Ross: But if they were to file a petition you would come in and say fine and dandy, so therefore you must be saying we really don't care for this gas.

Mr. Woods: We are saying this, we don't care for it on the terms they have laid down, and we can furnish our customers with gas without this. Now, we couldn't perhaps without the Mud Lake gas. If the situation were reversed, and we have to

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have tremendous reserves, we might say to Socony, you have us where you want us, but we don't need this Johnson Bayou gas in order to serve Beaumont.

Chairman Swidler: You are saying you don't want them to abandon it, but you will not be a dog in the manger and if they want to abandon you will not stand in the way?

Mr. Woods: That is the point.

Chairman Swidler: And on the certificate point you say you cannot abandon something you are certificated to do.

Commissioner Woodward: Mr. Woods, I don't know whether you have the answer to this question or not, but based on the volumes of gas that you bought the year preceding December 31, 1963, with the approximate four-cent increase that was proposed by Continental, what amount of money would be involved, how much increase over what you were paying, and what the new 15.75-cent price would be?

Mr. Woods: I don't have the figures with me, and it is not very much money, to tell you the truth it is only 4 cents an Mcf. It might be 10 cents if it went on up higher. I think we were only producing about a million feet a day in there, so it is not very much money.

Commissioner Woodward: O.K.

Commissioner O'Connor: Over a year it would be what, $40,000 or $400,000?

Mr. Woods: I am not sure. I can't place decimals that

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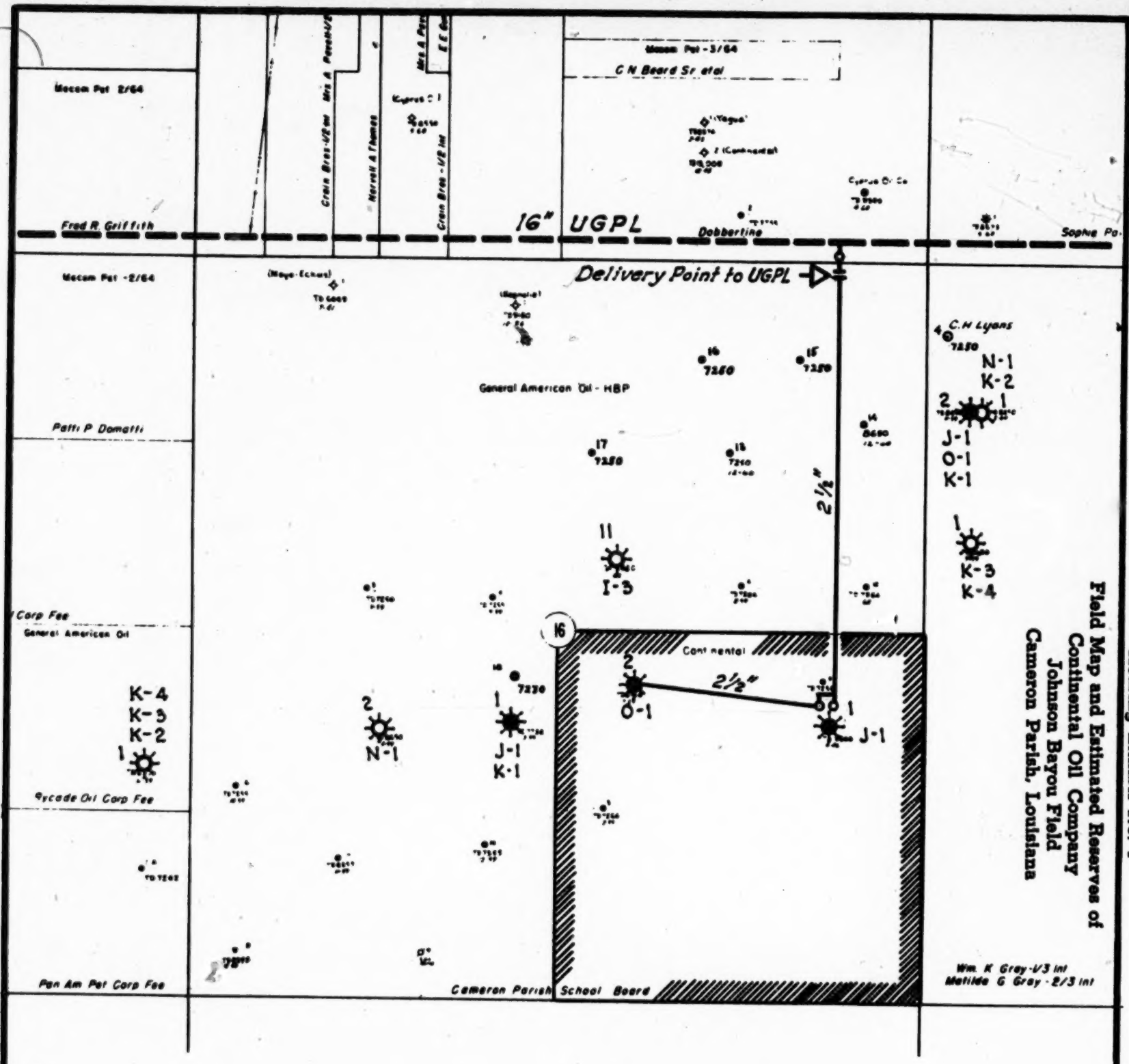
fast.

Chairman Swidler: Thank you. It has been a very fundamental argument. Thank you.

This concludes the hearing.

(Whereupon, at 12:14 p.m., the oral argument was closed.)

Field Map and Estimated Reserves of
Continental Oil Company
Johnson Bayou Field
Cameron Parish, Louisiana



LEGEND

- NON-ASSOCIATED GAS WELL SHOWING RESERVOIR COMPLETION (J, K)
- J-1 RESERVOIR COMPLETION
- O-1 RESERVOIR COMPLETION

EXHIBIT NO. ___
SCHEDULE I

CONTINENTAL OIL COMPANY

JOHNSON BAYOU FIELD
T-15 S , R-14 W
CAMERON PARISH , LOUISIANA

SCALE
500 0 1000 2000
FEET

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Schedule 2

CONTINENTAL OIL COMPANY

ESTIMATED PROVEN GAS RESERVES DEDICATED TO UNITED GAS PIPE LINE COMPANY JOHNSON BAYOU FIELD— CAMERON PARISH, LOUISIANA

Reservoir	2-1-63 Remaining Reserves, MMCF 15.025 Psia	14.73 psia
H-4	242	247
J-1	1,317	1,343
K-1	1,360	1,387
K-2	718	732
K-3	410	418
K-4	492	502
M-2	195	199
N-1	938	957
O-1	572	583
Total	6,244	6,368

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Hearing Exhibit No. 2

Assignment

THE STATE OF LOUISIANA }
PARISH OF CAMERON }

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, CONTINENTAL OIL COMPANY, a Delaware corporation, is the present holder and owner of that certain oil, gas and mineral lease dated February 2, 1948, from Cameron Parish School Board, as Lessor, to Continental

Oil Company, as Lessee, recorded in Conveyance Book 68, Page 34, File No. 53542 of the records of Cameron Parish, Louisiana, and affecting lands located in the Parish of Cameron, State of Louisiana, described as follows, to-wit:

SE¼ of Section 16, Township 15 South, Range 14 West; and

WHEREAS, by an instrument dated July 17, 1944, Continental Oil Company and Yegua Corporation, a Texas Corporation, entered into a Joint Operating Agreement relating to the development and operation for oil and gas upon certain lands and leases in Cameron Parish, Louisiana, which provides, among other things, for the acquisition of additional leases and their disposition, said agreement being made a part hereof by reference and for all purposes; and

WHEREAS, Sohio Petroleum Company, an Ohio corporation, is a successor to all the rights and obligations of Yegua Corporation under said Joint Operating Agreement; and

WHEREAS, the aforesaid lease is within the area covered by the provisions of said Joint Operating Agreement and Continental Oil Company now desires to assign an interest in said lease to Sohio Petroleum Company pursuant to the terms of said operating agreement.

NOW, THEREFORE, for valuable considerations, the

receipt and adequacy of which is hereby acknowledged Continental Oil Company has and does by these presents transfer, convey, assign and deliver without warranty of title,

either express or implied, unto said Sohio Petroleum Company an undivided one-half (½) of all its rights, title and interest in and to the oil, gas and mineral lease hereinabove described.

This assignment is made and accepted, subject to any and all oil payments and overriding royalties to which the above described lands and lease, or any portion thereof, may be subject and particularly to the following:

a. The terms and provisions of that certain assignment of overriding royalty executed by Sohio Petroleum Company and Continental Oil Company to Humble Oil & Refining Company and Magnolia Petroleum Company, dated June 30, 1945, recorded in Conveyance Book 59 at Page 396 of the records of Cameron Parish, Louisiana.

b. The terms and provisions of that certain assignment of overriding royalty, executed by Sohio Petroleum Company and Continental Oil Company to George H. Echols, dated July 6, 1945, recorded in Conveyance Book 59 at Page 410, File No. 49351, Conveyance Records of Cameron Parish, Louisiana.

It is understood and agreed that the interest hereby assigned shall bear one-half (½) of any and all such oil payments and overriding royalties.

It is further understood and agreed that this assignment is made and accepted subject to the above mentioned Joint Operating Agreement and that the interest of the parties hereto in and to said lease shall be held by each of them under and subject to the terms and provisions of said agreement.

In Testimony Whereof, this instrument is executed

this 2nd day of June, 1948, in the presence of the undersigned competent witnesses.

CONTINENTAL OIL COMPANY

By /s/ CHAS A. PERLITZ, JR.
Vice President

ATTEST:
/s/ W. C. STOUT
Assistant Secretary
(SEAL)

WITNESSES:
/s/ MARGUERITE BRILEY
/s/ NINA TANNER

SOHIO PETROLEUM COMPANY

By /s/ GEO. S. BUCHANAN
Asst. Vice President

ATTEST:
/s/ H. D. HENDERSON
Assistant Secretary
(SEAL)

/s/ ELMER G. HAMILTON
/s/ HAYGOOD L. HENDRY

STATE OF TEXAS }
COUNTY OF HARRIS }

On this 2nd day of June, 1948, before me appeared Chas. A. Perlitz, Jr., to me personally known, who, being by me duly sworn, did say that he is VICE PRESIDENT of CONTINENTAL OIL COMPANY, a corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Chas. A.

Perlitz, Jr. acknowledged said instrument to be the free act and deed of said corporation.

WHEREOF WITNESS my hand and seal as such Notary Public on the day, month and year first above written.

(SEAL) /s/ HELEN B. LEDBETTER
Notary Public in and for
Harris County, Texas

STATE OF TEXAS }
COUNTY OF HARRIS }

On this 7th day of July, 1948, before me appeared Geo. S. Buchanan, to me personally known, who, being by me duly sworn, did say that he is ASS'T. VICE PRESIDENT of SOHIO PETROLEUM COMPANY, a corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Geo. S. Buchanan acknowledged said instrument to be the free act and deed of said corporation.

WHEREOF WITNESS my hand and seal as such Notary Public on the day, month and year first above written.

/s/ LILIAN DUMBLE
(SEAL) *Notary Public in and for*
Harris County, Texas

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The following resolution was offered by Mr. John Richard, who moved its adoption, which motion was seconded by Mr. Raymond Sanner, and carried unanimously by the Board:

RESOLUTION

WHEREAS The Continental Oil Company and Sohio Petroleum Company have jointly made application to this Board

to advertise for bids for an oil, gas and mineral lease affecting the following described land, to-wit:

> The Southeast Quarter (SE ¼) of Section 16, Township 15 South, Range 14 West, Louisiana Meridian, containing 160 acres, more or less, situated in Cameron Parish, Louisiana.

WHEREAS attached to said application of the Continental Oil Company and Sohio Petroleum Company was a certified check from the Continental Oil Company in the amount of $50.00 evidencing good faith of the applicants and a requirement by law.

NOW, THEREFORE, BE IT RESOLVED By the Cameron Parish School Board that it does hereby acknowledge receipt of the joint application of the Continental Oil and Sohio Petroleum Oil Company to cause the said tract of land to be advertised for bids for oil, gas and mineral lease, and of the $50.00 certified check attached thereto; and that this Board is of the opinion that it is to the best interest of the schools of this Parish to comply with the request to cause the said tract of land to be advertised for lease, and

BE IT FURTHER RESOLVED That lease be let on the said tract of land subject to the right of the Continental Oil Company and Sohio Petroleum Company to draw and remove casing from Continental Oil Company and Sohio Petroleum Company No. 1 School Land Wall located in the NE ¼ of SE ¼ of Section 16, Township 15 South, Range 14 West, Louisiana Meridian, situated in Cameron Parish, Louisiana, and

BE IT FURTHER RESOLVED That Thomas W. McCall, Secretary of this Board, be and he is hereby authorized and directed to cause the said tract of land to be advertised for bids for oil, gas and mineral lease as required by law, for and on behalf of this Board. The Bids to be received

on or before the second (2nd) day of February, 1948, at eleven (11) o'clock A. M. in the office of the Board in the Courthouse at Cameron, Louisiana.

I hereby certify that the above is a true and correct copy of resolution adopted by the Cameron Parish School Board in regular session convened on Monday, January 5, 1948.

THOS. W. MCCALL
Thos. W. McCall,
Secretary

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OIL, GAS AND MINERAL LEASE

New South Louisiana—Revised Six
M. L. Bath Co., Ltd. D13215

The School Board of Cameron Parish, Louisiana, represented herein by Dennis Bonsall, its President, hereunto duly authorized by virtue of Resolution adopted by said Board at regular meeting held on Feb. 2, 1948, copy of which is attached hereto as a part hereinafter called "Lessor" (whether one or more) grants, leases and lets unto Continental Oil Company, a Delaware Corp. hereinafter called "Lessee", the exclusive right to enter upon and use the land hereinafter described for the exploration for, and production of, oil, gas, sulphur and all other minerals, together with the use of the surface of the land for all purposes incident to the exploration for and production, ownership, possession and transportation of said minerals, and the right of ingress and egress to and from said lands at all times for such purposes, including the right to construct, maintain and use roads and/or canals thereon, for operations hereunder or in connection with similar operations on adjoining land, and including the right to remove from the land any property placed by Lessee thereon and to draw

and remove casing from wells drilled by Lessee on said land; the land to which this lease applies and which is affected hereby being situated in Cameron Parish, Louisiana, and described as follows, to-wit:

The Southeast Quarter (SE¼) of Section 16, Township 15 South, Range 14 West, containing 160 acres, more or less.

For the purpose of calculating the payments hereinafter provided for, the land is estimated to comprise 160 acres, whether it actually comprises more or less.

This lease shall be for a term of Five (5) years and No months from the date hereof (called "primary term") and so long thereafter as oil, gas or some other mineral is being produced or drilling operations are conducted as hereinafter provided for; all subject to the following conditions and agreements:

1. This lease shall terminate on the 2nd day of February, 1949, unless on or before said date Lessee shall either: (1) produce and market, in paying quantities oil or gas from the well drilled by Lessee situated on said land under a prior lease by Lessor to Lessee; or (2) commence operations for the drilling of a new well on the land in search of oil, gas or other minerals and thereafter continue such operations and drilling to completion; or (3) pay Lessor a rental of Eight hundred ($800.00) Dollars, for all or that part of the land which Lessee elects to continue to hold hereunder, which payment shall maintain Lessee's rights in effect as to such land, without drilling operations or production from the existing well upon said land, for one (1) year from the date above mentioned; and Lessee may continue to maintain the rights granted without such drilling operations or production from said existing well for successive twelve-month periods (during the

primary term) by paying Lessor on or before the beginning of such respective periods Eight Hundred & No/100 Dollars ($800.00) for all or that part of the land held hereunder. Payments may be made to the Lessor or may be mailed or delivered for deposit to Lessor's credit in the Lake Charles Bank & Trust Company Bank of Lake Charles, Louisiana which Bank or its successor shall continue to be the depository for such rentals, as the representative of Lessor and Lessor's successors and assigns; and the death or incapacity of Lessor shall not terminate or affect Lessee's right to continue to deposit all payments in said depository bank or its successor. The mailing of the check or draft of Lessee or Lessee's successors to the said Bank on or before the rental paying date shall be considered as payment of rental and operate to maintain Lessee's right in force and effect. Should said Bank fail or liquidate, or if it shold for any reason fail or refuse to accept Lessee's check or draft, the attempted payment in the manner above provided shall not be thereby rendered ineffective and Lessee shall not be in default for failure to pay said rental until thirty (30) days after Lessor shall have furnished Lessee with a recordable instrument naming a new depository; and this provision shall apply to all such new and subsequently named depositories.

2. Lessee may, at any time prior to or after the discovery and production of minerals on the land, execute and deliver to Lessor or place of record a release or releases of any portion or portions of the lands and be relieved of all requirements hereof as to the land surrendered. In the event of the forfeiture of this lease for any cause, Lessee shall have the right to retain around each well then producing oil, gas or other minerals or being drilled or worked on the num-

ber of acres fixed and located by the spacing order of any regulatory body of the State of Louisiana or of the United States under which said well is being drilled or producer; and if no spacing order or drilling unit has been issued or fixed by governmental authority, then Lessee shall have the right to retain twenty (20) acres surrounding each well then producing or being drilled or worked on, such twenty acres to be is as near a square form as is practicable.

3. After beginning operations on the land and prior to a new discovery and production of minerals in paying quantities, Lessee may maintain the rights granted during and after the primary term by continuing such operations without the lapse of more than ninety (90) days between abandonment of work on one well and beginning operations for drilling another; and during the primary term such operations may be discontinued and the rights granted maintained by resuming rental payments, by paying within ninety (90) days from the discontinuance of operations (regardless of the fixed rental paying date) the proportion of the fixed yearly rental that the number of days between the end of said ninety (90) days and the next ensuing rental paying date bears to the twelve months period; but, if said ninety (90) days should expire during any year for which rentals have been paid, no further rental shall be due until the next fixed rental paying date.

4. If, prior to or after the discovery of oil or gas on the lands held hereunder, a well producing either oil or gas in paying quantities is brought in on adjacent lands and within Three Hundred Thirty (330) feet of any line of the land held hereunder, Lessee, in order to maintain the rights granted, shall thereafter begin within 90 days and prosecute with reasonable diligence the drilling of a well in an effort to discover

oil or gas thereby and to protect the land held hereunder from drainage.

5. After the discovery and/or production of oil, gas or any other mineral in paying quantities the rights granted shall be maintained in effect during and after the primary term and without the payment of the rentals hereinabove provided for so long as oil, gas or some other mineral is being produced in paying quantities, or Lessee is carrying on operations with reasonable diligence looking to the production thereof. It is provided, however, that if, after the discovery and/or production of oil, gas or other minerals in paying quantities, the production thereof should cease from any cause this lease shall terminate unless Lessee resumes or restores such production, or commences additional drilling, reworking or mining operations within ninety (90) days thereafter and continues such operations without the lapse of more than ninety (90) days between abandonment of work on one well and commencement of reworking operations or operations for the drilling of another, in an effort to restore production of oil, gas or other minerals or (if during the primary term) resumes the payment of rentals in the manner hereinabove provided for in connection with the abandonment of wells drilled. Lessee shall not be required to produce more than one mineral if discovered to exist under the lands, the production of any one mineral in paying quantities and with reasonable diligence being sufficient to maintain all of Lessee's rights. Should Lessee be unable to produce gas or gaseous substances because of lack of market or marketing facilities or Governmental restrictions, then Lessee's rights may be maintained, in the absence of production or drilling operations, by commencing or resuming rental payments as hereinabove provided for in connection with the drilling of a

non-producing well; and should such conditions occur or exist after the primary term Lessee's rights may be further extended by the commencement, resumption or continuance of such payments at the rate and in the manner herein fixed for rental payments during the primary term; provided, however, that in no event shall Lessee's rights be so extended by rental payments and without drilling operations or production of oil, gas or some other mineral for more than two years beyond the end of the primary term.

6. The royalties to be paid by Lessee are: (a) on oil, one-eighth (⅛th) of that produced and saved from the land; (b) one-eigthth (⅛th) of the market value of the gas sold or used by Lessee; (c) one-eighth (⅛th) of the value at the mouth of the well of casinghead gas used in manufacturing casinghead gasoline to be computed by methods recognized in the industry; (d) One Dollar ($1.00) for each ton of 2240 pounds of sulphur, payable when marketed; and (e) one-eighth (⅛th) of the value of all other minerals mined and marketed. Oil royalties shall be delivered to Lessor free of expense at Lessor's option in tanks furnished by Lessor at the well or to Lessor's credit in any pipe line connected therewith. In the event Lessor does not furnish tanks for such royalty oil and no pipe line is connected with the well, Lessee may sell Lessor's royalty oil at the best market price obtainable and pay Lessor the price received f. o. b. the leased property, less any severance or production tax imposed thereon. A royalty of Ten (10¢) per long ton shall be paid by Lessee on all stock produced and served hereunder.

7. The Lessee shall be responsible for all damages to timber and growing crops of Lessor caused by Lessee's operations.

8. All provisions hereof shall extend to and bind the successors and assigns (in whole or in part) of Lessor and Lessee; but no change in the ownership of the land or any interest therein or change in the capacity or status of Lessor, whether resulting from sale, inheritance or otherwise, shall impose any additional burden on Lessee nor shall any change in ownership or in the status or capacity of Lessor impair the effectiveness of payments made to Lessor herein named unless the then record owner of said lease shall have been furnished, thirty (30) days before payment is due, with certified copy of recorded instrument or judgment evidencing such transfer, inheritance or sale or evidence of such change in status or capacity of Lessor. The furnishing of such evidence shall not affect the validity of payments theretofore made in advance. In the event of the assignment of this lease, either as to a segregated portion of the land or as to an undivided interest in the lease contract, delay rentals shall be apportioned among the several leasehold owners according to the surface area or the undivided interest of each as long as delay rentals are not reduced.

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9. Lessor hereby warrants and agrees to defend the title to said land and agrees that Lessee may at its option, discharge any tax, mortgage or other lien upon the land and be subrogated thereto and have the right to apply to the repayment of Lessee any rentals and/or royalties accruing hereunder. If Lessor owns less than the entire undivided interest in all or any portion of the lands or mineral rights relating thereto (whether such interest is herein specified or not) royalties as to the land in which an interest is outstanding in others shall be reduced proportionately to the interest of the Lessor therein, and all outstanding royalty rights shall be deducted from the royalties herein provided for.

Whether or not any reduction in rentals shall have previously been made this lease, without further evidence thereof, shall immediately attach to and affect any and all rights, titles, and interests in the described land hereafter acquired by or inuring to Lessor and Lessor's successors and assigns.

10. In the event Lessor's title or an interest therein is claimed by others, Lessee shall have the right to withhold payment of royalties or to deposit such royalties in the registry of the Court until final determination of Lessor's rights.

11. If the land herein described is owned in divided or undivided portions by more than one party, this instrument may be signed in any number of counterparts, each of which shall be binding on the party or parties so signing regardless of whether all of the owners join in the granting of this lease.

12. The requirements hereof shall be subject to any State and/or Federal law or order regulating operations on the land.

Lessor acknowledges to have received from Lessee the sum of One Thousand and No/100 Dollars ($1,000.00) as full and adequate consideration for all rights, options and privileges herein granted.

In Witness Whereof, this instrument is executed as of February 2nd, 1948.

Cameron Parish School Board

Witnesses: By: Dennis Bonsall

I. C. Carter *President*

W. B. Hackett

Continental Oil Company

I. C. Carter By: C. B. Hammers

W. B. Hackett *Agent.*

STATE OF LOUISIANA }
PARISH OF CAMERON }

On this 2nd day of February, 1948, before me appeared Dennis Bonsall to me personally known, who, being by me duly sworn, did say that he is the President of the Cameron Parish School Board of Cameron Parish, Louisiana, and that the foregoing instrument was signed in behalf of said School Board by authority of a Resolution thereof, dated February 2, 1948 and said Dennis Bonsall acknowledged said instrument to be the free act and deed of said Cameron Parish School Board.

CHAS. F. HEBERT
Notary Public.

(Seal)

Sworn to and Subscribed before me ....., 19.....

Notary Public in and for .....Parish, Louisiana.

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COPY

February 2, 1948

I hereby certify that the attached is a true and correct copy of resolution adopted by the Cameron Parish School Board in regular session convened on Monday, February 2, 1948.

THOS. W. MCCALL
Thos. W. McCall,
Secretary

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The hour of eleven o'clock having arrived, the President stated that bids for the leasing for mineral purposes, of the following described property, owned by the School Board, were to be received at this meeting, pur-

suant to advertisement therefor in accordance with law, viz.;

The Southeast Quarter (SE¼) of Section 16, Township 15 South, Range 14 West, containing 160 acres, more or less, located in Cameron Parish, Louisiana;

In accordance with said call, the President requested in a loud and audible voice that all bids be submitted on Section 16, Township 15 South, Range 14 West.

Thereupon, The Continental Oil Company submitted the only sealed bid for on oil, gas and mineral lease on Section 16, Township 15 South, Range 14 West; and after discussion, the following resolution was offered by Mr. John Richard, seconded by Mr. Rodolph Theriot, and carried unanimously by the Board:

RESOLUTION

WHEREAS The bid received by the Board and submitted by the Continental Oil Company is of apparent advantage to the Board and for a consideration which is fair and to the Board's advantage, and

WHEREAS It is to the desire of this Board to accept the bid submitted to this Board by the Continental Oil Company, as lessee, an oil, gas and mineral lease covering said property,

NOW, THEREFORE BE IT RESOLVED By the Cameron Parish School Board in regular session assembled on this second (2nd) day of February, 1948, That the Continental Oil Company is hereby granted an oil, gas and mineral lease relating to and affecting the above described property, for a consideration of cash bonus of One Thousand & No/100 Dollars ($1,000.00), with the right reserved to said lessee to continue the lease in effect without drilling op-

erations for additional periods of one year, not to exceed a total of five (5) years, by the payment of an annual delay rental of Eight Hundred & No/100 Dollars ($800.00); said lease to provide for a royalty to this Board of one-eighth (⅛) of all oil and gas produced and saved; one-eighth (⅛) of the net value of gas, casinghead gas and all other liquid or gaseous hydrocarbons substance produced and saved; One Dollar ($1.00) per long ton on sulphur produced and saved; Ten Cents only ($.10) per long ton for all potash produced and saved; and one-eighth (⅛) of all other minerals produced and saved; and all in accordance with and subject to the terms and conditions shown in copy of said lease contract, initialed for identification herewith as part of the minutes of this Board, and

Be It Further Resolved That Dennis Bonsall, President of this Board, be and he is hereby authorized and directed to sign and execute said lease contract on behalf of this Board immediately upon adoption of this Resolution and in the presence of this Board while assembled in regular session as aforesaid; and the Secretary of this Board is further authorized to certify a copy of this Resolution and attach same to the lease contract thus approved by this Board, and executed by this Board through its President, as above authorized.

Be It Further Resolved That in accordance with Law, said lease is subject to the approval of the State Mineral Board.

Signed: Dennis Bonsall,
President

Attest:
Signed: Thos. W. McCall,
Secretary

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RESOLUTION

Upon motion of Mr. Heywood, seconded by Mr. Smither, the Board unanimously approved a proposed lease from the Cameron Parish School Board to the Continental Oil Company and Sohio Petroleum Company, jointly, covering the Southeast Quarter of Section 16, Township 15 South, Range 14 West, Cameron Parish, Louisiana Meridian, containing 160 acres, more or less, same having been approved by the Attorney General's office as to form and legality.

CERTIFICATE

I hereby certify that the above is a true and correct copy of a resolution unanimously adopted on motion duly seconded at a meeting of the State Mineral Board held in the State Capitol in the City of Baton Rouge, Louisiana, on the 23rd day of March, 1948, pursuant to due notice, at which meeting a quorum was present and that said resolution is duly entered in the Minute Book of said Board and is now in full force and effect.

JOHN R. FRIDGE
Secretary,
State Mineral Board

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FPC Gas Rate Schedule No. 115

Gas Purchase Contract

THIS CONTRACT made and entered into this 22nd day of January, 1955, by and between CONTINENTAL OIL COMPANY, a corporation, hereinafter referred to as Seller, and UNITED GAS PIPE LINE COMPANY, a corporation, hereinafter referred to as Buyer;

WITNESSETH:

WHEREAS, Seller is producing gas from certain lands and leaseholds in the Johnson Bayou Field, Cameron Parish, Louisiana, and has a supply of such gas available for sale; and

WHEREAS, Buyer is the owner of gas pipe lines serving various markets, and desires to purchase from Seller, as hereinafter provided, gas to supply a portion of the requirements of said lines;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth, the parties hereto hereby covenant and agree as follows:

I.

Subject to all the terms, conditions and limitations hereinafter set forth, Seller hereby sells and agrees to sell and deliver to Buyer and Buyer agrees to purchase and receive from Seller, at the delivery point hereinafter set forth, in the usual conduct of Buyer's business, and in accordance with the terms and provisions hereof, merchantable natural gas in the quantities hereinafter set forth produced from all wells now or hereafter drilled on all lands and leaseholds now or hereafter owned by Seller, which are located within the area in Cameron

Parish, Louisiana, outlined in red on the plat marked Exhibit "A" attached hereto and made a part hereof, including Seller's interest in said lands and leaseholds which are jointly owned with others, and Seller's proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units which include any part of Seller's aforesaid lands and leaseholds, and the gas of other parties produced from such lands and leaseholds which Seller has or shall hereafter have from time to time and at any time the right to market; subject, however, to the reservation by Seller of sufficient natural gas for:

1. The development and operation of Seller's lands and leaseholds covered hereby, including gas for repressuring oil producing horizons in such lands and for gas lift operations;

2. The operation of any gasoline, dehydration, or compressor plant which Seller may construct for the purpose of processing, dehydrating or compressing the gas delivered under the terms of this agreement; and

3. The supplying to Seller's lessors of gas to which such lessors are entitled under the terms of Seller's leaseholds covered by this agreement.

It is recognized that Seller has a minority interest in Stanolind Oil and Gas Company, et al's McManus No. 1 Well located in Section 20, Township 15 South, Range 14 West, Cameron Parish, Louisiana, and Stanolind Oil and Gas Company, the operator of the well, does not contemplate marketing any gas from the well; therefore, Seller shall not be required to deliver any gas therefrom.

It is agreed that Seller have the right, prior to its delivery of such gas to Buyer hereunder, to produce natural

gas from any of its wells subject to the terms hereof, and return such gas to the

formation from which it was produced, or to other producing formations covered by this agreement, after separating therefrom any distillate or condensate content and after extracting therefrom at Seller's option, any or any part of the liquefiable hydrocarbons contained in such gas, provided, however, that in so exercising such right Seller shall not in any wise interfere with Buyer's right at any time and from time to time during the term hereof to take natural gas from said wells in the quantities hereafter provided for; provided further that nothing in this paragraph shall be construed so as to alter or modify the reservation set forth in subparagraph 1 above.

Buyer shall have the right and privilege from time to time, at any time during the term of this agreement, of purchasing, subject to the reservations above set forth, all of the natural gas which can be produced from the lands and leaseholds covered hereby; however, Buyer shall not be under any obligation to take all or any specified proportion of the natural gas that can be produced from the aforesaid premises during any defined or specified time. Subject to the ability of the lands and leaseholds covered hereby to produce such quantities, Buyer shall take natural gas ratably from the above lands and leaseholds in the same proportion that it takes natural gas from the lands and leaseholds of others from whom Buyer is now purchasing and may hereafter purchase natural gas in the field in which said premises of Seller are located. It is recognized and agreed that in taking natural gas ratably Buyer is unable, due to varying operating conditions, to withdraw natural gas in exact ratable proportions during any specific month, but Buyer agrees that it will, to the best of its

ability, by balancing excesses against deficiencies during periods of reasonable duration, maintain a ratable

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proportion of withdrawals from Seller's lands and leaseholds as compared with the withdrawals from the lands and leaseholds of others from whom Buyer is now purchasing and may hereafter purchase natural gas in the field in which said premises of Seller are located.

Subject to all the terms and provisions hereof, Seller shall have the right at any time during the term of this agreement to unitize any of its lands and leaseholds covered hereby with the lands and leaseholds of others or with other lands and leaseholds which Seller may hereafter acquire.

Seller shall not be obligated to produce any well on the lands and leaseholds covered hereby at a rate in excess of that which, in Seller's judgment, is unsafe or at a rate in excess of the allowable production therefrom under any applicable laws or regulations of any governmental authority having jurisdiction, whichever of such rates may be the lower rate.

Nothing in this contract shall be construed so as to require Seller to operate or develop the lands and lease holds covered hereby other than as an ordinary prudent operator would do under the same or similar circumstances.

Seller shall have the right to sell or dispose of any surplus gas which Buyer is not purchasing from time to time, but any contract or agreement for the sale or disposition of such surplus gas shall be subject to Buyer's prior right to take from Seller hereunder at any time and from time to time such surplus gas.

II.

Seller agrees to deliver and Buyer agrees to receive the gas

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deliverable hereunder at a mutually agreeable point on Buyer's 16-inch Mud Lake-Port Arthur main line in Section 9, Township 15 South, Range 14 West, Cameron Parish, Louisiana, which said point shall constitute the delivery point for the gas delivered hereunder. Seller agrees to commence and proceed with reasonable diligence in the construction of a pipe line from the lands and leaseholds covered hereby to the aforesaid delivery point so as to enable Seller to deliver the quantities of gas which it is obligated to deliver under the terms of this agreement. Deliveries of gas hereunder shall commence when the facilities which are necessary to enable Seller to deliver and Buyer to receive gas under the terms of this agreement have been completed.

III.

Seller shall deliver and Buyer shall receive the gas deliverable hereunder at the above described delivery point at as high prssure as may be required by Buyer but not in excess of one thousand (1,000) pounds per square inch gauge, but Seller shall not be required to make delivery of gas at a pressure higher than that which can be maintained from the natural pressure of the wells; provided, however, that if at any time Seller is unable to make delivery from any well at the required pressure, then Buyer shall have the right but shall not be obligated to take gas from such well at a lower pressure, or at its option Buyer may install field compressors or utilize existing compressors for the purpose of facilitating deliveries of gas hereunder, and in the event Buyer does not elect to exercise its option to take gas from such well at a lower

pressure or to install or utilize compressors, then Seller shall have the right but shall not be obligated to

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install field compressors for the purpose of facilitating deliveries of gas from such well hereunder.

In the event Seller is unable to make delivery of gas from such well at the required pressure and Buyer does not elecet, by written notice to Seller, given within sixty (60) days from the date on which Seller is first unable to make delivery from such well at the required pressure, to accept delivery at a lower pressure or to install or utilize compressors to increase the delivery pressure, and in the event Seller does not elect to install or utilize compressors in order to make delivery from such well to Buyer, then Buyer agrees, upon receipt of written notice from Seller that Seller does not intend to recondition, plug back, rework or recomplete said well, to advise Seller in writing that any such well and all of the production therefrom is released from all provisions of this contract and shall no longer be covered hereby, and further agrees to deliver to Seller an appropriate instrument releasing to Seller any right, title and interest which Buyer has in said well by virtue of this agreement.

If, after the date of first delivery of gas under this contract, Buyer should fail to take any gas from the Seller during any period of thirty (30) consecutive days, if Seller has such gas available for delivery to Buyer, then Seller may, in addition to all other rights and remedies, but subject to conditions of force majeure, terminate this contract.

IV.

At or near the delivery point, Buyer shall install, operate and maintain, at its expense, a measuring station properly equipped with

orifice meter or meters of standard type for the measurement of gas delivered to Buyer hereunder. Seller shall have access to the measuring equipment at all reasonable times, but readings, calibrations and adjustments thereof, and changing of charts shall be done by the employees or agents of Buyer. Buyer shall read the meters weekly, or as often as may be necessary, and shall keep said meters accurate and in repair, making tests monthly or as much oftener as Buyer may deem necessary. Seller shall have the right to challenge the accuracy of said meters, and when challenged, the meters shall be tested and repaired by Buyer; the cost of such special test to be borne by Buyer if the percentage of inaccuracy is found to be more than two percent (2%), but if the percentage of inaccuracy is found to be two per cent (2%) or less, the cost of such special test shall be borne by Seller. If said meters are found on any test to be inaccurate more than two per cent (2%), then corrections shall be made for the time said meters have been inaccurate, but in no event to extend back beyond the last date settlement for gas was due. The charts and records from such measuring equipment shall remain the property of Buyer. Upon request of Seller, Buyer shall submit to Seller records and charts from its measuring equipment, together with calculations therefrom, for Seller's inspection and verification, subject to return by Seller with twenty (20) days from receipt thereof, after which return the charts and records shall be kept on file by Buyer for a period of one year, after which time they may at Buyer's option be destroyed.

If, for any reason, meters are out of service or out of repair so that the amount of gas delivered cannot be ascertained or computed

from the readings thereof, the gas delivered during the period such meters are out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering;

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathmatical calculation;

(c) By estimating the quantity of delivery by deliveries during the preceding periods under similar conditions when the meter was registering accurately.

Seller may, at its option and expense, install and operate check meters to check Buyer's meters, but measurement of gas for the purpose of this agreement shall be by Buyer's meters only, except in cases hereinabove specifically provided to the contrary. Check meters shall be either the orifice or volumetric type and shall be subject at all reasonable times to inspection or examination by Buyer, but the reading, calibration and adjustment thereof and changing of charts shall be done only by Seller.

V.

The gas to be delivered under this contract shall be merchantable gas as produced in its natural state from the well or wells, free of any objectionable liquids and solids, except that Seller shall separate, or cause to be separated, any liquid hydrocarbons, and may extract, or cause to be extracted any natural gasoline and other hydrocarbons which may be produced with or as a part of such gas, pro-

vided that by such extraction the determined heating value of the gas shall not be reduced to less than 1,000

gross British thermal units per cubic foot determined at thirty (30) inches of mercury, sixty degrees (60°) Fahrenheit and saturated with water vapor. In extracting the natural gasoline and separating the liquid hydrocarbons or condensable hydrocarbons from the gas to be delivered hereunder, Seller agrees that it will not subject or permit said gas to be subjected to any treatment in such extraction or separation processes which will change the chemical composition of any of the component parts of said gas, permit or cause the admission of oxygen, or dilute said gas.

A. Buyer shall not be required to take, but shall have the right to take from Seller hereunder gas containing in excess of:

(a) Forty (40) grains of sulphur per thousand cubic feet;

(b) Twenty (20) grains of hydrogen sulphide per thousand cubic feet;

(c) Eleven hundred (1100) gross British thermal units per cubic foot determined at thirty (30) inches of mercury, sixty degrees (60°) Fahrenheit and saturated with water vapor;

(d) One per cent (1%) by volume of oxygen;

(e) Two per cent (2%) by volume of carbon dioxide;

(f) Two-tenths gallon of liquefiable hydrocarbons (commonly referred to as natural gasoline) per thousand cubic feet as determined by the charcoal absorption method as prescribed by the American

Gas Association in their testing code No. 101, effective January 1, 1933.

In the event Seller should tender to Buyer hereunder gas which does not meet the quality specifications contained in this subparagraph A, Buyer shall have the option to be exercised in sixty

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(60) days, (a) to accept such gas, or (b) reject, and require Seller to exclude from delivery hereunder, the gas from any well or wells which causes the gas tendered to fall below said quality specifications. If Buyer, under (a) above, accepts such gas it shall have the right at any time thereafter, upon giving sixty (60) days' written notice to Seller, to reject, and require Seller to exclude from delivery hereunder, the gas from any well or wells which causes the gas tendered to fall below said quality specifications. If Buyer should, as provided above, reject any gas, either at the time it is first tendered by Seller or at a later date, Seller shall then have the right to sell or dispose of said gas to parties other than Buyer; provided, however, that in the event Seller should at any time in the future in any way process such gas so that same does meet said quality specifications, Buyer shall have the option to take such gas hereunder.

VI.

Notwithstanding any other provisions of this contract, Buyer shall not be required to continue taking gas hereunder when Seller is unable to deliver gas to Buyer at the aforesaid delivery point in quantities in excess of five hundred thousand (500,000) cubic feet of gas per day at a

pressure sufficient to enter Buyer's line against the working pressures maintained therein from time to time.

VII.

Seller hereby warrants the title to the gas delivered hereunder,

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the right to sell the same and that it is free from all liens and adverse claims, and agrees, if notified thereof by Buyer, to indemnify Buyer against all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of any adverse legal claims of any and all persons to or against said gas.

Seller agrees to account and pay, or cause to be paid, to the parties entitled thereto any royalties, overriding royalties or like charges on the gas delivered hereunder.

Seller agrees to pay or cause to be paid all taxes and assessments imposed on Seller with respect to the gas delivered hereunder, prior to its delivery to Buyer, and Buyer agrees to pay or cause to be paid all taxes and assessments imposed upon Buyer with respect to the gas delivered hereunder after its receipt by Buyer. Buyer agrees to reimburse Seller for the following taxes which may be levied upon and paid by Seller, or which Seller under contractual or legal obligation, pays to the person or company on which such taxes are levied, on the gas delivered hereunder:

(a) Severance taxes up to, but not in excess of the amount of the severance tax presently levied by Act 10 of the Louisiana Legislature, Regular Session of 1948;

(b) Gathering taxes up to, but not in excess of the amount of the severance tax presently levied by

Act 11 of the Louisiana Legislature, Regular Session of 1948.

The taxes referred to in the foregoing subparagraphs (a) and (b), up to the respective maximum amounts therein provided, shall not be considered as "new, additional or increased taxes" under the following provisions of this Article. In the event that any new, additional or increased

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taxes are lawfully imposed on and paid by Seller with respect to the gas relivered hereunder, Buyer agrees to reimburse Seller for one-half (½) of the amount of any such new, additional or increased taxes so paid by Seller, or which Seller under contractual or legal obligation refunds to the person or company on which such taxes are levied. The term "tax" as used herein shall mean any tax (other than ad valorem, income or excess profits tax), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term "tax" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the state as a foreign corporation.

VIII.

All gas delivered by Seller to Buyer hereunder shall be measured in accordance with the Standard Gas Measurement Law, known as Act 479 of the Louisiana Legislature, Regular Session of 1950.

A "cubic foot of gas" for the purpose of measurement of the gas delivered by Seller to Buyer hereunder is the

amount of gas necessary to fill a cubic foot of space when the gas is at the absolute pressure of fifteen and twenty-five-thousandths (15.025) pounds per square inch and at a base temperature of sixty degrees (60°) Fahrenheit. The volumes of

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gas delivered hereunder shall be computed into such units in the manner described below.

The orifice coefficient for each meter shall be calculated at the above base pressure and base temperature, at a flowing temperature of sixty degrees (60°) Fahrenheit, and for a gas of sixty-hundredths (.60) specific gravity. For the purpose of measurement hereunder, the atmospheric pressure shall be assumed to be fourteen and seven-tenths (14.7) pounds per square inch. Pressure taps for orifice meter installations shall be taken from the pipe runs two and one-half (2½) internal pipe diameters upstream and eight internal pipe diameters downstream from the face of the orifice plate.

The temperature of the gas delivered hereunder shall be determined by the use of a recording thermometer so installed that it may properly record the temperature of the gas flowing through the meter or meters. The average temperature recorded shall be used in computing measurements and the orifice coefficient shall be corrected for variation in the average temperature from sixty degrees (60°) Fahrenheit.

The specific gravity of the gas delivered hereunder shall be determined by spot tests made with an Edwards type gas balance, or by such other method as shall be agreed upon between the parties, said tests to be made at least every three (3) months. Each test so made shall determine the specific gravity to be used in the computation of the volume of gas delivered during the succeeding billing

months until the next test. The orifice coefficient shall be corrected for variation in the specific gravity of the gas from sixty-hundredths (.60).

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All orifice meter computations required shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931).

The volumes of gas as determined in the manner described above shall be adjusted to give effect to the deviation of such gas from Boyle's Law as follows:

(a) There shall be determined the average pressure (gauge) at which the gas was delivered during the period under consideration;

(b) There shall be selected from the table of multipliers attached hereto and made a part hereof, and identified as Exhibit "B", the multiplier corresponding to the average pressure as determined in (a) above and to the flowing temperature which was used for the purpose of measurement during the period under consideration;

(c) The adjusted volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas as determined in the manner above set forth by the multiplier determined in (b) above.

If the Commissioner of Conservation of the State of Louisiana should at any time disapprove the multipliers set out in said Exhibit "B", or if at any time the composition of the gas delivered to Buyer hereunder shall have materially changed so that the multipliers set out in Exhibit "B" are no longer reasonable, either party may call for a review of such multipliers. Such new multipliers shall be subject to the approval of the Commissioner of

Conservation of the State of Louisiana, if such Commissioner at that time has jurisdiction over such matters.

IX.

The price to be paid by Buyer to Seller for each one thousand

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(1,000) cubic feet of gas delivered hereunder shall be 8.0973¢ for the five (5) year period commencing on the date deliveries of gas are commenced hereunder, and thereafter, 8.9970¢.

X.

For the purpose of billing and accounting for gas delivered hereunder, the day shall begin at 7:00 o'clock A. M. and extend to 7:00 o'clock A. M. of the following day, and the month (herein called "billing month") shall begin at 7:00 o'colck A. M. on the first day of the calendar month and extend to 7:00 o'clock A. M. on the first day of the following calendar month.

Settlement shall be made by check each calender month for all gas delivered hereunder during the preceding billing month.

XI.

Buyer shall, insofar as Seller is able to convey such rights, have an easement and servitude on Seller's lands, leaseholds and rights of way, for installing, operating and maintaining equipment, with the right to remove the same before or within a reasonable time after the expiration of this contract; shall further have the right to operate, inspect and test measuring equipment; and shall, at all times, have the right to free access to any part of Seller's lands, leaseholds and rights of way for any purpose connected with any matter or thing covered by this contract.

XII.

This contract is subject to all present and future valid orders, rules and regulations of any regulatory body of the Federal Government or

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the State in which these premises are situated, having jurisdiction.

XIII.

Subject to the other provisions hereof, this agreement shall continue and remain in full force and effect for a primary term of ten (10) years from the date upon which deliveries of gas are commenced hereunder, and shall continue in force and effect thereafter for successive periods of one year each; provided, however, that either party hereto may terminate this agreement at the end of the primary term or any succeeding annual period by giving to the other party at least ninety (90) days' prior written notice of the intention of the party giving such notice to terminate this agreement.

XIV.

In the event of either party hereto being rendered unable, wholly or in part, by force of majeure to carry out it obligations under this agreement, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public

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enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such term shall likewise include (a), in those instances where any party hereto is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses, and (b), in those instances where any party hereto is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permissions from any governmental agency to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies, permits and permissions.

It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having

the difficulty, and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

IV.

As between the parties hereto, Seller shall be in control and possession of its gas deliverable hereunder and responsible for any damages or injury caused thereby until the same shall have been delivered to Buyer at the delivery point hereinabove set forth, after which delivery Buyer shall be deemed to be inexclusive control and possession thereof and responsible for any injury or damage caused thereby.

XVI.

No waiver by either party of any one or more defaults by the other party in the performance of this contract shall operate or be construed as a waiver of any future default or defaults, whether of a like or a different character.

XVII.

It is recognized that Seller now owns lands and leaseholds in the area outlined and designated as Exhibit "A" hereof jointly with other not parties to this contract, or that Seller may hereafter acquire such joint interests. Buyer and Seller, therefore, now agree that such other joint owner or owners may at any time during the term of this contract by instrument in writing, adopt and become a party seller to this contract as to his or its said proportionate part of said gas.

XVIII.

All the stipulations, terms and conditions of this contract shall extend to and be binding upon the respective successors and assigns of the parties hereto, and shall constitute a real right and covenant running with the land.

In Witness Whereof, the parties hereto have caused this agreement to be executed in duplicate originals by their respective corporation officers thereunto duly authorized on the day and year first above written.

Continental Oil Company

By O. L. Fisher
Attorney in Fact

Attest:

Secretary

Seller

United Gas Pipe Line Company

By Ed Parkes
Vice President

Attest:

Secretary

Buyer

Witnesses:
Kathleen Ray
Marjorie Hurley

Witnesses:
Jo Ann Nease
J. H. Cooper

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STATE OF TEXAS:
COUNTY OF HARRIS:

On this 22nd day of January, 1953, before me appeared O. L. Fisher, to me personally known, who, being by me duly sworn did say that he is the Attorney in Fact of CONTINENTAL OIL COMPANY, and that the seal affixed to said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said O. L Fisher acknowledged said instrument to be the free act and deed of said corporation.

MADILYN WILSON
Notary Public in and for
Harris County, Texas

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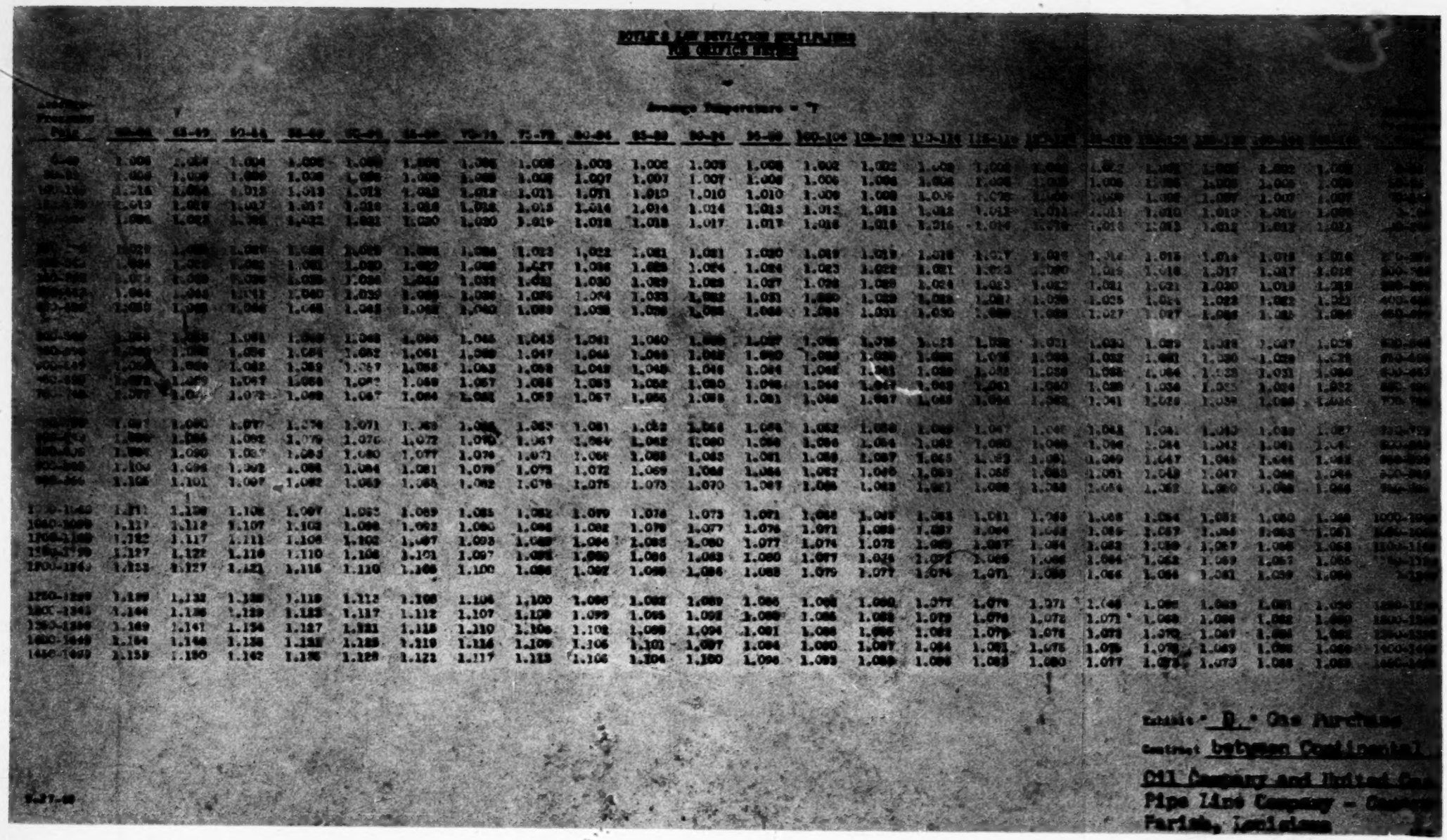
STATE OF LOUISIANA:
PARISH OF CADDO:

On this 23 day of January, 1953, before me appeared Ed Parkes, to me personally known, who, being by me duly sworn did say that he is the Vice President of UNITED GAS PIPE LINE COMPANY, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said Ed Parkes acknowledged said instrument to be the free act and deed of said corporation.

JAMES L. ASKEW
Notary Public in and for
Caddo Parish, Louisiana



BOYLE'S LAW DEVIATION MULTIPLIERS
FOR GASEOUS FLUIDS

Average Temperature - °F

Average Pressure Psia	60-64	65-69	70-74	75-79	80-84	85-89	90-94	95-99	100-104	105-109	110-114	115-119	120-124	125-129	130-134	135-139	140-144	145-149	150-154	155-159
4-49	1.006	1.004	1.004	1.005	1.005	1.005	1.005	1.005	1.005	1.005	1.005	1.005	1.005	1.004	1.004	1.004	1.004	1.004	1.004	1.004
50-99	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006
100-149	1.016	1.014	1.013	1.013	1.012	1.011	1.011	1.010	1.010	1.010	1.009	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	1.007
150-199	1.019	1.019	1.017	1.017	1.016	1.016	1.015	1.014	1.014	1.014	1.013	1.013	1.012	1.012	1.011	1.011	1.010	1.010	1.010	1.009
200-249	1.026	1.025	1.024	1.022	1.021	1.020	1.020	1.019	1.018	1.018	1.017	1.017	1.016	1.016	1.016	1.015	1.015	1.014	1.013	1.013
250-299	1.033	1.032	1.031	1.030	1.029	1.028	1.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.022	1.021	1.020	1.020	1.019	1.018
300-349	1.039	1.038	1.037	1.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.027	1.026	1.025	1.024	1.023	1.022	1.021
350-399	1.045	1.044	1.043	1.042	1.041	1.040	1.039	1.038	1.037	1.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026
400-449	1.051	1.050	1.049	1.048	1.047	1.046	1.045	1.044	1.043	1.042	1.041	1.040	1.039	1.038	1.037	1.036	1.035	1.034	1.033	1.032
450-499	1.057	1.056	1.055	1.054	1.053	1.052	1.051	1.050	1.049	1.048	1.047	1.046	1.045	1.044	1.043	1.042	1.041	1.040	1.039	1.038
500-549	1.063	1.062	1.061	1.060	1.059	1.058	1.057	1.056	1.055	1.054	1.053	1.052	1.051	1.050	1.049	1.048	1.047	1.046	1.045	1.044
550-599	1.069	1.068	1.067	1.066	1.065	1.064	1.063	1.062	1.061	1.060	1.059	1.058	1.057	1.056	1.055	1.054	1.053	1.052	1.051	1.050
600-649	1.075	1.074	1.073	1.072	1.071	1.070	1.069	1.068	1.067	1.066	1.065	1.064	1.063	1.062	1.061	1.060	1.059	1.058	1.057	1.056
650-699	1.081	1.080	1.079	1.078	1.077	1.076	1.075	1.074	1.073	1.072	1.071	1.070	1.069	1.068	1.067	1.066	1.065	1.064	1.063	1.062
700-749	1.087	1.086	1.085	1.084	1.083	1.082	1.081	1.080	1.079	1.078	1.077	1.076	1.075	1.074	1.073	1.072	1.071	1.070	1.069	1.068
750-799	1.093	1.092	1.091	1.090	1.089	1.088	1.087	1.086	1.085	1.084	1.083	1.082	1.081	1.080	1.079	1.078	1.077	1.076	1.075	1.074
800-849	1.099	1.098	1.097	1.096	1.095	1.094	1.093	1.092	1.091	1.090	1.089	1.088	1.087	1.086	1.085	1.084	1.083	1.082	1.081	1.080
850-899	1.105	1.104	1.103	1.102	1.101	1.100	1.099	1.098	1.097	1.096	1.095	1.094	1.093	1.092	1.091	1.090	1.089	1.088	1.087	1.086
900-949	1.111	1.110	1.109	1.108	1.107	1.106	1.105	1.104	1.103	1.102	1.101	1.100	1.099	1.098	1.097	1.096	1.095	1.094	1.093	1.092
950-999	1.117	1.116	1.115	1.114	1.113	1.112	1.111	1.110	1.109	1.108	1.107	1.106	1.105	1.104	1.103	1.102	1.101	1.100	1.099	1.098
1000-1049	1.123	1.122	1.121	1.120	1.119	1.118	1.117	1.116	1.115	1.114	1.113	1.112	1.111	1.110	1.109	1.108	1.107	1.106	1.105	1.104
1050-1099	1.129	1.128	1.127	1.126	1.125	1.124	1.123	1.122	1.121	1.120	1.119	1.118	1.117	1.116	1.115	1.114	1.113	1.112	1.111	1.110
1100-1149	1.135	1.134	1.133	1.132	1.131	1.130	1.129	1.128	1.127	1.126	1.125	1.124	1.123	1.122	1.121	1.120	1.119	1.118	1.117	1.116
1150-1199	1.141	1.140	1.139	1.138	1.137	1.136	1.135	1.134	1.133	1.132	1.131	1.130	1.129	1.128	1.127	1.126	1.125	1.124	1.123	1.122
1200-1249	1.147	1.146	1.145	1.144	1.143	1.142	1.141	1.140	1.139	1.138	1.137	1.136	1.135	1.134	1.133	1.132	1.131	1.130	1.129	1.128
1250-1299	1.153	1.152	1.151	1.150	1.149	1.148	1.147	1.146	1.145	1.144	1.143	1.142	1.141	1.140	1.139	1.138	1.137	1.136	1.135	1.134
1300-1349	1.159	1.158	1.157	1.156	1.155	1.154	1.153	1.152	1.151	1.150	1.149	1.148	1.147	1.146	1.145	1.144	1.143	1.142	1.141	1.140
1350-1399	1.165	1.164	1.163	1.162	1.161	1.160	1.159	1.158	1.157	1.156	1.155	1.154	1.153	1.152	1.151	1.150	1.149	1.148	1.147	1.146
1400-1449	1.171	1.170	1.169	1.168	1.167	1.166	1.165	1.164	1.163	1.162	1.161	1.160	1.159	1.158	1.157	1.156	1.155	1.154	1.153	1.152

Exhibit "B" One Purchase
Contract between Continental
Oil Company and United Gas
Pipe Line Company - Caddo
Parish, Louisiana

9-27-48

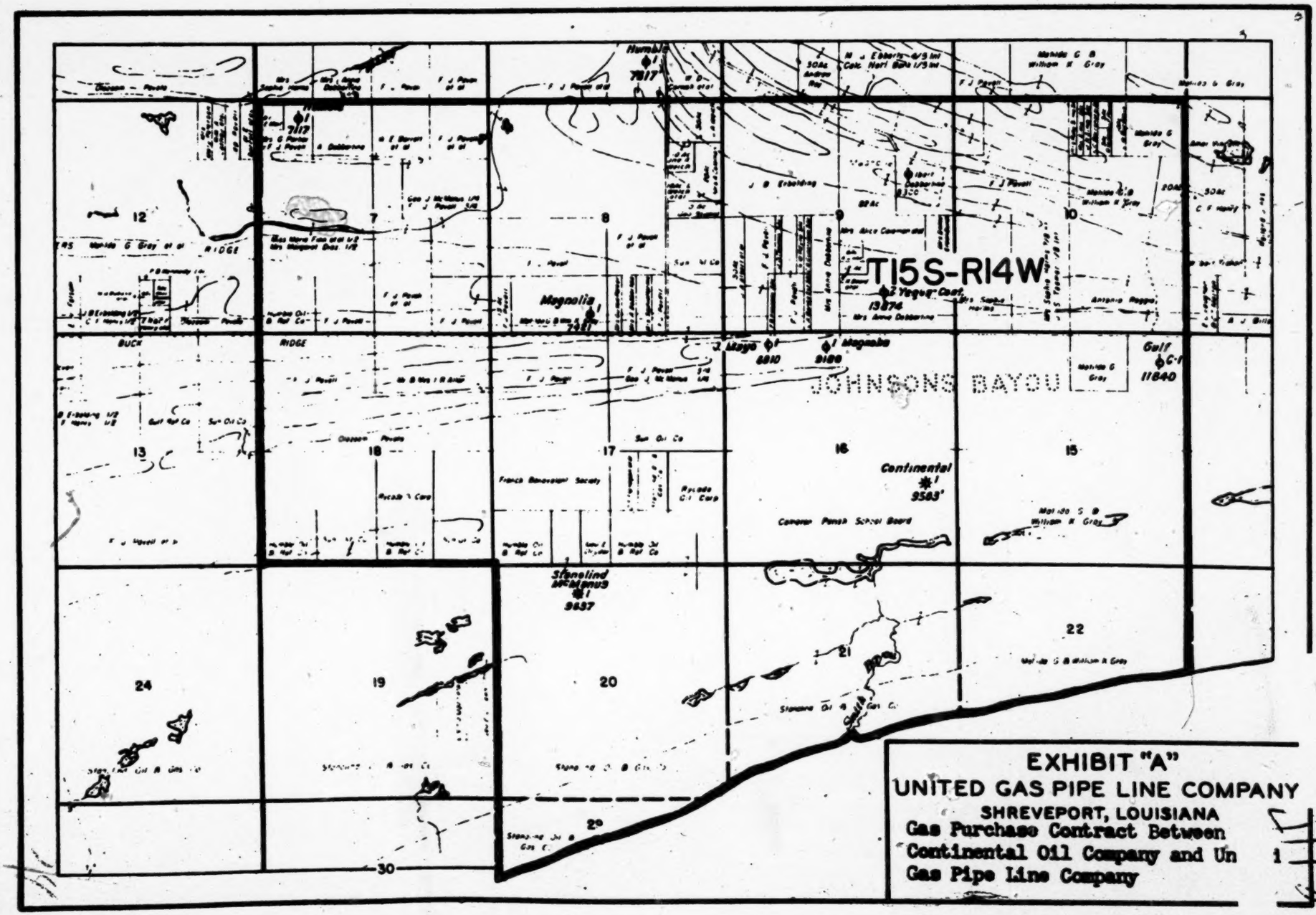


EXHIBIT "A"
UNITED GAS PIPE LINE COMPANY
SHREVEPORT, LOUISIANA
Gas Purchase Contract Between
Continental Oil Company and Un
Gas Pipe Line Company

UNITED GAS PIPE LINE COMPANY
GAS PURCHASE STATEMENT

68957

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GAS PURCHASE CONTRACT NAME	R. R. C. NUMBER	FIELD	DIST.	STATE	DATE MO.	DAY	YR.
CONTINENTAL OIL COMPANY CAMERON 9 SCHOOL BOARD 1	1551 00	[illegible]	56	RR	6	30	1954

(2) VOLUME FOR DETERMINATION	(3) GROSS VALUE	(4) TAX	(5) NET VALUE	(6) PRICE	(7) OUTSIDE NET VALUE
26299	2129 51		2129 51	08 09 73	2129 51 2129 51

PURCHASE OWNER NO.	INTEREST OWNER NAME	R. R. C. NUMBER	INTEREST	INTEREST VALUE
[illegible]	CONTINENTAL OIL COMPANY	1551 00	1 000000 1 000000	2129 51 2129 51

RECEIVED
NOV 8 1954
CONSERVATION DEPARTMENT

[illegible] AT STATE SEVERANCE TAX/GOVERNMENT RATE

[illegible] IS THE PRICE PAID BY THE STATE STANDARD MEASUREMENT BASE

(249)

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CONTINENTAL OIL COMPANY
MAKE REMITTANCES ATTENTION ASSISTANT TREASURER
DRAWER 1287
PONCA CITY, OKLAHOMA

United Gas Pipe Line Company — July 29, 1954
1525 Fairchild Avenue — Issued at Ponca City, Okla.
Shreveport, Louisiana — Invoice No. ———

We charge your account

For severance tax applicable to your purchase of gas under G.P.C. No. 1551 (Cameron Parish) and gas gathering tax for quarter ending June 30, 1954:

1954	Severance Tax	Gathering Tax	Total Charge
April	$104.56	$348.54	$453.10
May	117.97	393.24	511.21
June	78.90	262.99	341.89
	$301.43	$1,004.77	$1,306.20

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

CONTINENTAL OIL COMPANY

FPC Gas Rate Schedule No. 115 Supplement No. 1

"CHANGE IN RATE SCHEDULE" FOR CONTINENTAL OIL COMPANY'S CONTRACT NO. 4173—FPC GAS RATE SCHEDULE NO. 115

Subject to all of the denials, exceptions and reservations set out in any applications, motions and petitions filed by it with the Federal Power Commission (Commission), and specifically denying that it is a natural gas company under

the Natural Gas Act or that it is subject to the jurisdiction of the Commission with respect to the transactions herein described, and subject further to its letter of transmittal dated November 22, 1954, and to the attachments to such letter of transmittal, Continental Oil Company (Continental) in accordance with Section 154.94 of Order No. 174-B and acting only under compulsion, files this notice of "Change in Rate Schedule," as Supplement No. 1, effective January 31, 1958, covering the following described contract, which is on file with the Commission as Continental's Gas Rate Schedule No. 115:

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Purchaser: United Gas Pipe Line Company
Contract Date: January 22, 1953
Field: Johnson Bayou
Parish and State: Cameron, Louisiana

Article IX of said contract provides that the price to be paid for gas for the period beginning January 31, 1958, shall be 8.9970¢ per Mcf, measured at 15.025 psia, plus reimbursement of severance and gathering tax amounting to 1.3¢ per Mcf for a total new price of 10.297¢ per Mcf.

The provisions of the subject contract by which the stipulated price is established were arrived at by arms length bargaining between the parties and constitutes an integral part of the consideration upon which the contract is based. A change in price pursuant to the provisions of said contract as constituted on the date of the initial filing thereof, is not a change to the contract and is therefore not a "change in rate."

The proposed price is substantially lower than prices which have been accepted by the Commission and which are currently being paid within a 24-mile radius. United Fuel Gas Company is paying Humble Oil and Refining Company

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(R.S. No. 24) 16¢ per Mcf in Cameron Meadows, only 8 miles northeast. The Texas Company (R.S. No. 4) and Magnolia Petroleum Company (R.S. No. 1) are receiving 16¢ from United Fuel Company in East Mud Lake, 18 miles east northeast, and Gum Cove, 22 miles north northeast, respectively. American Louisiana Pipe Line Company is paying British American Oil Producing Company (R.S. No. 17) 18.25¢ per Mcf plus 1¢ reimbursement of Louisiana tax, for gas purchased in the Cameron Field, only 24 miles northeast of the Johnson Bayou Field. In view of this, to deny Seller the price which the contract specifies effective January 31, 1958, would be to discriminate against this particular Seller and against all of Seller's royalty owners who receive an agreed fraction of the price which Seller receives.

It is not the intention of Continental, as Operator, to voluntarily file this instrument for anyone other than itself, and it has not been authorized to do so. However, Continental is endeavoring to comply with the requirements of Order 190 and is listing below the owners of an interest in gas sold under Continental's Gas Sales Contract No. 4173, FPC Gas Rate Schedule No. 115, as reflected by the contents

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of its files:

Continental Oil Company (Operator)	50%
Sohio Petroleum Company	50%
(Sohio is not a party to this contract)	

Continental does not represent or warrant that the contents of its files are true or correct.

Table I attached hereto and made a part hereof sets forth a statement of sales made by months for the twelve

months immediately preceding January 31, 1958, in comparison with increased revenue for the estimated volumes of sales by months for the succeeding twelve months after the effective date of the "Change in Rate Schedule."

A copy of this instrument has been mailed to United Gas Pipe Line Company, Shreveport 92, Louisiana, and Sohio Petroleum Company, 1300 Skirvin Tower Hotel, Oklahoma City 2, Oklahoma, Attention of Mr. Dewey J. Sabin, being the only other interested parties.

Communications with respect hereto should be sent to:

Mr. Fred B. Willson
Coordinator of Natural Gas Sales
Continental Oil Company
Post Office Box 2197
Houston 1, Texas
and

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Mr. Roland B. Voight
Legal Department
Continental Oil Company
Post Office Box 2197
Houston 1, Texas.

CONTINENTAL OIL COMPANY

Original Signed:
FRED B. WILLSON
Fred B. Willson

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TABLE I

Comparative Statement of Volumes Sold and Amounts Received for the Sale of Gas to United Gas Pipe Line Company from the Johnson Bayou Field, Cameron Parish, Louisiana. This Sale is Covered by Continental's Contract No. 4173 on File with the Commission as Continental's FPC Gas Rate Schedule No. 115. Figures used in This Table Show Continental's Interest before Royalty.

	Volumes Mcf @ 15.025	AMOUNT Before Increase	Increase	After Increase
1957—Feb.	20,048	$ 1,883.97		
Mar.	22,042	2,071.35		
Apr.	21,638	2,033.39		
May	19,784	1,859.16		
June	16,598	1,559.76		
July	11,727	1,102.02		
Aug.	19,132	1,797.89		
Sept.	19,514	1,833.79		
Oct.	20,497	1,926.16		
[1]Nov.	18,800	1,766.69		
Dec.	19,400	1,823.08		
1958—Jan.	19,400	1,823.08		
Total	228,580	$21,480.34		
1958—Feb.	17,500	$ 1,644.53	$ 157.45	$ 1,801.98
Mar.	19,400	1,823.08	174.54	1,997.62
Apr.	18,800	1,766.69	169.14	1,935.83
May	19,400	1,823.08	174.54	1,997.62
June	18,800	1,766.69	169.14	1,935.83
July	19,400	1,823.08	174.54	1,997.62
Aug.	19,400	1,823.08	174.54	1,997.62
Sept.	18,800	1,766.69	169.14	1,935.83
Oct.	19,400	1,823.08	174.54	1,997.62
Nov.	18,800	1,766.69	169.14	1,935.83
Dec.	19,400	1,823.08	174.54	1,997.62
1959—Jan.	19,400	1,823.08	174.54	1,997.62
Total	228,500	$21,472.85	$2,055.79	$23,528.64

[1] Figures for November 1957 and subsequent months are estimated.

STATE OF TEXAS:
COUNTY OF HARRIS:

BEFORE ME, the undersigned authority, on this day personally appeared FRED B. WILLSON, who, being by me first duly sworn, on oath deposes and says:

That he is the Coordinator of Natural Gas Sales of CONTINENTAL OIL COMPANY; that he has read the foregoing "Change in Rate Schedule" and knows the contents thereof; that said "Change in Rate Schedule" was subscribed by him on behalf of said CONTINENTAL OIL COMPANY with full power and authority to do so; that the facts stated in said "Change in Rate Schedule" are true as stated except as to matters and things stated or indicated to be stated on information and belief, and as to those matters and things, he believes them to be true.

Original Signed:

FRED B. WILLSON
Fred B. Willson

SWORN TO AND SUBSCRIBED before me, this 30th day of December, 1957.

Original Signed:

MARY R. MULLINS

Notary Public in and for
Harris County, Texas

My Commission expires
June 1, 1959

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UNITED STATES OF AMERICA

BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

CONTINENTAL OIL COMPANY

FPC Gas Rate Schedule No. 115 Supplement No. 2

"CHANGE IN RATE SCHEDULE" FOR CONTINENTAL OIL COMPANY'S CONTRACT NO. 4173—FPC GAS RATE SCHEDULE NO. 115 SUPPLEMENT NO. 2

Subject to all the denials, exceptions, reservations and protests set out in all applications, motions and petitions filed by it with the Federal Power Commission ("Commission"), and while specifically denying that it is a natural gas company under the Natural Gas Act or that it is subject to the jurisdiction of the Commission with respect to the transactions described herein, Continental Oil Company ("Continental") in accordance with Section 154.94 of Order No. 174-B files this "Change in Rate Schedule" as Supplement No. 2 to Continental's FPC Rate Schedule No. 115, as amended, which is on file with the Commission and which is incorporated herein by reference.

The Louisiana Legislature by House Bill No. 303 amended Title 47 of the Louisiana Revised Statutes of 1950

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by adding thereto new sections to be designated as R.S. 47:678 through 47:681, all relative to the gas gathering tax, so as to provide for an additional tax over and above all existing taxes thereon of one cent, for a period of two years beginning August 1, 1958.

This instrument reflects the amount of tax reimbursement to be paid by Buyer to Seller as a result of an in-

crease in the Louisiana Gas Gathering Tax from 1¢ per Mcf to 2¢ per Mcf effective August 1, 1958.

Table I attached hereto and made a part hereof sets forth the price paid and to be paid as of July 31, 1958, and August 1, 1958, and the volume sold during the twelve month period between June 1, 1957, and May 31, 1958, inclusive.

Continental, as Operator, does not voluntarily file this "Change in Rate Schedule" for anyone other than Continental. However, acting only under compulsion, Continental is endeavoring to comply with the requirements of Order 190 and to furnish the information required by Order 190. Listed below are the owners of an interest in gas sold under Continental's Contract No. 4173, FPC Gas Rate Schedule No. 115, as reflected by the contents of its files:

Continental Oil Company (Operator)	50%
Sohio Petroleum Company	50%
(Sohio is not a party to this contract)	

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Continental does not represent or warrant that the contents of its files are true or correct.

A copy of this "Change in Rate Schedule" has been furnished to each of the interested parties.

Communications with respect hereto should be sent to:

Mr. Fred B. Willson
Coordinator of Natural Gas Sales
Continental Oil Company
Post Office Box 2197
Houston 1, Texas.

CONTINENTAL OIL COMPANY

Original Signed:
FRED B. WILLSON
Fred B. Willson

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TABLE I

Comparison of Rates

Continental's FPC Gas Rate Schedule No. 115
Continental's Contract No. 4173
Contract Date: January 22, 1953
Purchaser: United Gas Pipe Line Company
Field: Johnson Bayou
Parish and State: Cameron, Louisiana
Percentage of tax increase Buyer obligated to reimburse to Continental Oil Company: 50%
Volumes and price computed on 15.025 psia @ 60° F.

Date	Price Per Mcf	Tax Reimbursement	Total Price Per Mcf
July 31, 1958	8.9970¢	1.3¢	10.297¢
August 1, 1958	8.9970¢	1.8¢	10.797¢

Sales for 12 months ending April 30, 1958 233,964 Mcf
Volume shown represents Continental Oil Company's interest before royalty.

Continental's interest in the Johnson Bayou Field is 50%.

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STATE OF TEXAS:
COUNTY OF HARRIS:

BEFORE ME, the undersigned authority, on this day personally appeared FRED B. WILLSON, who, being by me first duly sworn, on oath deposes and says:

That he is the Coordinator of Natural Gas Sales of CONTINENTAL OIL COMPANY; that he has read the foregoing "Change in Rate Schedule" and knows the contents thereof; that said "Change in Rate Schedule" was subscribed by him on behalf of said CONTINENTAL

OIL COMPANY with full power and authority to do so; that the facts stated in said "Change in Rate Schedule" are true as stated except as to matters and things stated or indicated to be stated on information and belief, and as to those matters and things, he believes them to be true.

Original Signed:
FRED B. WILLSON
Fred B. Willson

SWORN TO AND SUBSCRIBED before me, this 14th day of July, 1958.

MARY R. MULLINS
Notary Public in and for
Harris County, Texas

My Commission expires
June 1, 1959

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

CONTINENTAL OIL COMPANY

FPC Gas Rate Schedule No. 115 Supplement No. 3

LOUISIANA GAS SEVERANCE TAX FILING
FPC ORDER NO. 210
CONTINENTAL'S CONTRACT NO. 4173
CONTINENTAL'S FPC GAS RATE SCHEDULE NO. 115

1. The filing is submitted pursuant to Commission Order No. 210 to reflect 50% reimbursement of the increases in the Louisiana gas severance tax of two cents (2¢)

per Mcf effective December 1, 1958, levied by Act No. 2 of Extraordinary Session of the Legislature 1958 of the State of Louisiana (House Bill No. 1) and/or to reflect the suspension of the two cents (2¢) per Mcf Louisiana gas gathering tax effective December 1, 1958, pursuant to Act No. 3 of the Extraordinary Session of the Legislature 1958 of the State of Louisiana.

Such filling is proposed to supersede Supplement No. 2—Docket No. G-15763 to the herein designated rate schedule.

2. Such reimbursement is provided by Article VII, paragraph 3, of the contract dated January 22, 1953, between Continental

Oil Company and United Gas Pipe Line Company on file with the Commission and designated Continental Oil Company (Operator) et al. FPC Gas Rate Schedule No. 115. Such reimbursement provision reads as follows:

See attached.

3. A copy of this filing was served on the buyer, as required by the Commission's Regulations, on December 19, 1958.

4. Comparison of rates prior to and subsequent to such change in rate (cents per Mcf) at 15.025 psia:

Date	Base Price Per Mcf	Tax Reimbursement Per Mcf	Total Price Per Mcf	Product Total Price Sales Volume Shown
July 31, 1958	8.9970¢	1.3¢	10.297¢	$23,700
Nov. 30, 1958	8.9970¢	1.8¢	10.797¢	$24,851
Dec. 1, 1958	8.9970¢	1.3¢	10.297¢	$23,700

Sales for 12 months ended September 30, 1958—230,167 Mcf.

Communications with respect hereto should be sent to:

Mr. Fred B. Willson
Coordinator of Natural Gas Sales
Continental Oil Company
Post Office Box 2197
Houston 1, Texas.

CONTINENTAL OIL COMPANY

Original Signed:

FRED B. WILLSON
Fred B. Willson

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TAX PROVISION

Continental's Contract No. 4173
Continental's FPC Gas Rate Schedule No. 115

Article VII—Paragraph 3:

Seller agrees to pay or cause to be paid all taxes and assessments imposed on Seller with respect to the gas delivered hereunder, prior to its delivery to Buyer, and Buyer agrees to pay or cause to be paid all taxes and assessments imposed upon Buyer with respect to the gas delivered hereunder after its receipt by Buyer. Buyer agrees to reimburse Seller for the following taxes which may be levied upon and paid by Seller, or which Seller under contractual or legal obligation, pays to the person or company on which such taxes are levied, on the gas delivered hereunder:

(a) Severance taxes up to, but not in excess of the amount of the severance tax presently levied by Act 10 of the Louisiana Legislature, Regular Session of 1948;

(b) Gathering taxes up to, but not in excess of the amount of the gathering tax presently levied by Act 11 of the Louisiana Legislature, Regular Session of 1948.

The taxes referred to in the foregoing subparagraphs (a) and (b), up to the respective maximum amounts therein provided, shall not be considered as "new, additional or increased taxes" under the following provisions of this Article. In the event that any new, additional or increased taxes are lawfully imposed on and paid by Seller with respect to the gas delivered hereunder, Buyer agrees to reimburse Seller for one-half (½) of the amount of any such new, additional or increased taxes so paid by Seller, or which Seller under contractual or legal obligation refunds to the person or company on which such taxes are levied. The term "tax" as used herein shall mean any tax (other than ad valorem, income or excess profits tax), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term "tax" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the state as a foreign corporation.

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MAILING LIST

Continental's Contract No. 4173
Continental's FPC Gas Rate Schedule No. 115

Copies of "Change in Rate Schedule" mailed to:

United Gas Pipe Line Company
Shreveport 92, Louisiana

Sohio Petroleum Company
1300 Skirvin Tower Hotel
Oklahoma City 2, Oklahoma

Interoffice distribution to:
EAA — EHL

STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared FRED B. WILSON, who, being by me first duly sworn, on oath deposes and says:

That he is the Coordinator of Natural Gas Sales of CONTINENTAL OIL COMPANY; that he has read the foregoing "Change in Rate Schedule" and knows the contents thereof; that said "Change in Rate Schedule" was subscribed by him on behalf of said CONTINENTAL OIL COMPANY with full power and authority to do so; that the facts stated in said "Change in Rate Schedule" are true as stated except as to matters and things stated or indicated to be stated on information and belief, and as to those matters and things, he believes them to be true.

Original Signed:

FRED B. WILSON
Fred B. Wilson

SWORN TO AND SUBSCRIBED before me, this 19th day of December, 1958.

Original Signed:

HALLIE R. MADELEY
Notary Public in and for Harris County, Texas

My Commission expires
June 1, 1959

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FPC Gas Rate Schedule No. 115 Supplement No. 4

UNITED GAS PIPELINE COMPANY
SHREVEPORT, LOUISIANA

December 1, 1958

In re: Gas Purchase Contract No. 1551
Continental Oil Company
Johnson Bayou Field
Cameron Parish, Louisiana

Gentlemen:

EXHIBIT A

Please refer to the captioned contract and any previous amendments thereto, under the terms of which we are obligated to reimburse you for a part of the increase in the Louisiana severance tax which you will be obligated to pay with respect to the gas delivered to us under such contract by virtue of the enactment of Act 2 of the First Extraordinary Session of the 1958 Louisiana Legislature. Act 2 of the First Extraordinary Session of the 1958 Louisiana Legislature (hereinafter referred to as Act 2) amended the existing Louisiana severance tax so as to provide for an increase in such tax during the period commencing December 1, 1958, at 7:00 A. M., and continuing until (i) 7:00 A. M. on August 1, 1960, or (ii) 7:00 A. M. on the first day of the calendar month following the date that the Louisiana gas gathering tax statute is determined by final decision of a court of last resort to be constitutional, whichever (i) or (ii) is the earlier date. The Louisiana gas gathering tax has, by virtue of other action taken in the First Extraordinary Session of the 1958 Louisiana Legislature, been suspended from 7:00 A. M. on December 1, 1958, until the first day of the calendar month following the date that the Louisiana gas gathering tax is determined

by final decision of a court of last resort to be constitutional, and during such period no gas gathering taxes are payable thereunder.

The captioned contract provides for our reimbursement to you, in addition to the reimbursement of Louisiana severence taxes up to the rate of three-tenths of one cent (.3¢) per thousand cubic feet ("Mcf") and the reinbursement of a portion of "new, additional or increased taxes", of one cent (1¢) per Mcf Louisiana gas gathering taxes levied under the provisions of R. S. 47:671-677, and in lieu of such one cent (1¢) reimbursement provision in the contract we propose, subject to the other provisions hereof, to reimburse you an additional one cent (1¢) per Mcf of the Louisiana severance tax imposed under the provisions of Act 2. Accordingly, this letter will evidence our agreement with you that for and in consideration of the mutual benefits accruing and to accrue to you and United Gas Pipe Line Company by the virtue of the execution hereof, United Gas Pipe Line Company will, during the period hereinafter provided, reimburse you for, in addition to the three-tenths of one cent (.3¢) per Mcf Louisiana severance tax in effect prior to the enactment

of Act 2, one cent (1¢) per Mcf of the increase in the Louisiana severance tax over and above three-tenths of one cent (.3¢) per Mcf of such severance tax paid by you under the provisions of Act 2 with respect to the gas delivered to us under the captioned contract. It is the intention of the parties hereto that, during the period covered by this agreement, all severance taxes imposed under the provisions of Act 2 on gas delivered under the captioned contract, up to one and three-tenths (1.3¢) per Mcf, shall be reimbursed to you by United Gas Pipe Line Company. With respect to any severance taxes levied under the pro-

visions of Act 2 and paid by you on or with respect to the gas delivered to us under the captioned contract, which severance taxes are in excess of the aforesaid one and three-tenths cents (1.3¢) per Mcf, we shall reimburse you for that portion of such excess severance tax as is provided for in the "new, additional or increased tax" provisions of the captioned contract.

This agreement shall, subject to the provisions of the next succeeding paragraph hereof, cover the period commencing at 7:00 A. M. on December 1, 1958, and terminating at (i) 7:00 A. M. on August 1, 1960, or (ii) 7:00 A. M. on the first day of the calendar month following the date that the Louisiana gas gathering tax statute is determined by final decision of a court of last resort to be constitutional, whichever (i) or (ii) is the earlier date; however, should the Louisiana Legislature take any action during the period hereinabove provided which changes either the amount of the severance taxes or gathering taxes, or both, to be paid by you with respect to the gas delivered under the captioned contract, this agreement shall automatically terminate and be of no further force or effect. Upon termination of this agreement United Gas Pipe Line Company's obligation to reimburse you for taxes paid by you with respect to the gas delivered under the contract shall be determined in the same manner as if this letter agreement had never been executed.

This agrement shall not become effective until you have obtained such approval as may be necessary from all governmental regulatory bodies having jurisdiction and have furnished us evidence of such approval.

In the event there are, in addition to the addressee hereof, other parties Seller to the captioned contract, this agreement shall not extend to gas delivered by such other parties Seller such other parties Seller or their authorized agents execute this agreement or a similar agreement.

Except as herein expressly changed and amended, the captioned contract shall remain in full force and effect in accordance with the respective terms and provisions thereof.

If the foregoing is acceptable to you, please indicate your acceptance in the space provided below and return one of the duplicate originals

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hereof to us for our file, thus constituting this letter an amendment to the captioned contract and binding upon us, our respective successors and assigns.

Yours very truly,

UNITED GAS PIPE LINE COMPANY

By M. V. COUSINS

Vice President

Accepted and Agreed to:

CONTINENTAL OIL COMPANY

By D. L. FISHER

Vice President

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FPC Gas Rate Schedule No. 115 Supplement No. 5

UNITED STATES OF AMERICA

BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

CONTINENTAL OIL COMPANY

"CHANGE IN RATE SCHEDULE" FOR CONTINENTAL OIL COMPANY'S CONTRACT No. 4173 FPC GAS RATE SCHEDULE No. 115 SUPPLEMENT No. 4

Subject to all of the denials, exceptions and reservations set out in any applications, motions and petitions filed by

it with the Federal Power Commission (Commission), and specifically denying that it is a natural gas company under the Natural Gas Act or that it is subject to the jurisdiction of the Commission with respect to the transactions herein described, Continental Oil Company (Continental) in accordance with Section 154.94 of Order No. 174-B and acting only under compulsion, files this notice of "Change in Rate Schedule," as Supplement No. 4, effective thirty days after receipt, covering the following described contract, as amended, which is on file with the Commission as Continental's Gas Rate Schedule No. 115:

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Purchaser: United Gas Pipe Line Company

Contract Date: January 22, 1953

Field: Johnson Bayou

Parish and State: Cameron, Louisiana.

Article VII of Continental's Contract No. 4173, as amended, provides that the Buyer shall reimburse Seller for severance taxes up to, but not in excess of .3¢ per Mcf; for gas gathering taxes up to, but not in excess of 1¢ per Mcf; and ½ of the amount of any new, additional or increased taxes above 1.3¢ per Mcf. The Louisiana Legislature levied an additional 1¢ per Mcf gas gathering tax effective August 1, 1958. Also in the First Extraordinary Session of 1958 the Louisiana Legislature suspended, effective December 1, 1958, the 2¢ per Mcf gas gathering tax and in lieu thereof levied an increase of 2¢ per Mcf in the severance tax, effective December 1, 1958, and continuing until August 1, 1960.

Exhibit "A" is a copy of a letter agreement dated December 1, 1958, between Continental Oil Company, Seller, and United Gas Pipe Line Company, Buyer, where-

in it is agreed that United Gas Pipe Line Company will reimburse Seller .3¢ per Mcf severance tax plus 1¢ per Mcf of the

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increase in the severance tax in lieu of the 1¢ per Mcf gas gathering tax imposed prior to August 1, 1958, plus ½ of the remaining 1¢ per Mcf of the increase in the severance tax for a total of 1.8¢ per Mcf tax reimbursement.

The following tabulation sets out the base price, tax reimbursement and total price for the periods ending November 30, 1958, and December 1, 1958. The tabulation also shows the amount of tax reimbursement which will be due Seller from Buyer when the attached letter agreement becomes effective:

	Base Price Per Mcf	Tax Reimbursement Per Mcf	Total Price Per Mcf	Product Total Price Sales Volume
Nov. 30, 1958	8.9970¢	1.8¢	10.797¢	$24,851
Dec. 1, 1958	8.9970¢	1.3¢	10.297¢	$23,700
Effective Date	8.9970¢	1.8¢	10.797¢	$24,851

Volume and price based on 15.025 psia.

Sales for 12 months ended September 30, 1958—230,167 Mcf.

The letter agreement does not in any way affect or increase the base price for the gas, but merely allows Continental to receive the same tax reimbursement it received prior to December 1, 1958. Continental respectfully requests that the Commission accept this filing and allow the change in tax

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reimbursement to become effective thirty days after receipt of this filing by the Commission.

The entire contract, of which the tax reimbursement provision is an integral part, was the result of arms' length bargaining and was predicated on the basis that such an arrangement would provide a desirable balance of revenue and expense between Buyer and Seller over the entire term of the contract. Thus, the increase in price proposed hereunder is but a part of a prearanged program and therefore is not a change in rate.

Continental, as Operator, does not voluntarily file this "Change in Rate Schedule" for anyone other than Continental. However, acting only under compulsion, Continental is endeavoring to comply with the requirements of Order 190 and to furnish the information required by Order 190. Listed below are the owners of an interest in the gas sold under Continental's Contract No. 4173, FPC Gas Rate Schedule No. 115, as reflected by the contents of its files:

Continental Oil Company (Operator)	50%
Sohio Petroleum Company	50%

(Sohio is not a party to this contract)

Continental does not warrant that the interest as shown for Sohio is true or correct.

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Communications with respect hereto should be sent to:

Mr. Fred B. Willson
Coordinator of Natural Gas Sales
Continental Oil Company
Post Office Box 2197
Houston 1, Texas.

CONTINENTAL OIL COMPANY

Original Signed:

FRED B. WILLSON

Fred B. Willson

STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared FRED B. WILLSON, who, being by me first duly sworn, on oath deposes and says:

That he is the Coordinator of Natural Gas Sales of CONTINENTAL OIL COMPANY; that he has read the foregoing "Change in Rate Schedule" and knows the contents thereof; that said "Change in Rate Schedule" was subscribed by him on behalf of said CONTINENTAL OIL COMPANY with full power and authority to do so; that the facts stated in said "Change in Rate Schedule" are true as stated except as to matters and things stated or indicated to be stated on information and belief, and as to those matters and things, he believes them to be true.

Original Signed:

FRED B. WILLSON
Fred B. Willson

SWORN TO AND SUBSCRIBED before me, this 16th day of January, 1959.

Original Signed:

HALLIE R. MADELEY
Notary Public in and for
Harris County, Texas

My Commission expires June 1, 1959

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FPC Gas Rate Schedule No. 115 Supplement No. 6

UNITED GAS PIPE LINE COMPANY
SHREVEPORT, LOUISIANA

July 1, 1960

In re: Gas Purchase Contract No. 1551
Continental Oil Company
Johnson Bayou Field
Cameron Parish, Louisiana

Continental Oil Company
P. O. Box 2197
Houston 1, Texas

Gentlemen:

Please refer to the captioned contract and any previous amendments thereto. We are, in accordance with the provisions of the captioned contract, as amended by letter agreement of December 1, 1958, presently reimbursing you for a portion of the increase in the Louisiana severance tax which you are obligated to pay under the provisions of Act 2 of the First Extraordinary Session of the 1958 Louisiana Legislature (Act 2) which became effective December 1, 1958, at 7:00 A. M. Both Act 2 and said letter agreement of December 1, 1958, expire by their own terms at 7:00 A. M. on August 1, 1960; however, the Louisiana Legislature in its 1960 Regular Session enacted Act 9 (hereinafter referred to as Act 9) which provides that the severance tax rate on gas severed from the soil or water in the State of Louisiana shall be the same rate as that provided by said Act 2 beginning on the expiration date of said Act 2 and continuing until 7:00 A. M., June 30, 1964. United Gas Pipe Line Company is willing to amend the captioned contract so that you will, subject to the pro-

visions hereinafter set forth, be entitled to receive the same amount of tax reimbursement from United Gas Pipe Line Company with respect to the gas delivered under the captioned contract from 7:00 A. M., August 1, 1960, until 7:00 A. M., June 30, 1964, as that which you are now receiving from United Gas Pipe Line Company with respect to the gas delivered under the captioned contract.

Accordingly, this letter will evidence our agreement with you that, for and in consideration of the mutual benefits accruing and to accrue to you and United Gas Pipe Line Company by virtue of the execution hereof, United Gas Pipe Line Company will, during the period hereinafter provided, reimburse you for, in addition to the three-tenths of one cent (.3¢) per thousand cubic feet (Mcf) Louisiana severance tax in effect prior to December 1, 1958, one cent (1¢) per

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Mcf of the increase in the Louisiana severance tax over and above three-tenths of one cent (.3¢) per Mcf of such severance tax paid by you under the provisions of Act 9 with respect to the gas delivered to us under the captioned contract. It is the intention of the parties hereto that, during the period covered by this agreement, all severance taxes imposed under the provisions of Act 9 with respect to the gas delivered under the captioned contract, up to one and three-tenths cents (1.3¢) per Mcf, shall be reimbursed to you by United Gas Pipe Line Company. With respect to any severance taxes levied under the provisions of Act 9 and paid by you with respect to the gas delivered to us under the captioned contract, which severance taxes are in excess of the aforesaid one and three-tenths cents (1.3¢) per Mcf, we shall reimburse you for that portion of such excess severance tax as is provided for in the "new, additional or increased tax" provisions of the captioned contract.

This agreement shall, subject to the provisions of the next succeeding paragraph hereof, cover the period commencing at 7:00 A. M. on August 1, 1960, and terminating at 7:00 A. M. on June 30, 1964; however, should the Louisiana Legislature take any action during the period hereinabove provided which changes the amount of the severance taxes to be paid by you with respect to the gas delivered under the captioned contract, this agreement shall automatically terminate and be of no further force or effect whatsoever. Upon termination of this agreement United Gas Pipe Line Company's obligation to reimburse you for taxes paid by you with respect to the gas delivered under the captioned contract shall be determined in the same manner as if this letter agreement had never been executed.

This agreement shall not become effective until you have obtained such approval as may be necessary from all governmental regulatory bodies having jurisdiction and have furnished us evidence of such approval.

In the event there are, in addition to the addresses hereof, other parties Seller to the captioned contract, this agreement shall not extend to gas delivered by such other parties Seller until such other parties Seller or their authorized agents execute this agreement or a similar agreement.

Except as herein expressly changed and amended, the captioned contract shall remain in full force and effect in accordance with all of the terms and provisions thereof.

If the foregoing is acceptable to you, please indicate your acceptance on the duplicate originals hereof in the space provided below and return one of the originals to us for our file, thus constituting this letter

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an amendment to the captioned contract for the limited period herein provided, and binding upon us, our respective successors and assigns.

Very truly yours,

UNITED GAS PIPE LINE COMPANY
By C. C. BARNETT
Vice President

Accepted and Agreed to:

CONTINENTAL OIL COMPANY
By D. L. FISHER
Vice President

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FPC Gas Rate Schedule No. 115 Supplement No. 7

CONTINENTAL OIL COMPANY
P. O. BOX 2197
HOUSTON 1, TEXAS

December 28, 1962

Mr. J. H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.

Re: Change in Rate Schedule
Continental's Contract No. 4173
Continental's FPC Gas Rate Schedule No. 115
Supplement No. 7 — Johnson's Bayou Field,
Cameron Parish, Louisiana

Dear Sir:

In accordance with Section 154.94, as amended, of the Federal Power Commission's Regulations under the Natural Gas Act, Continental Oil Company (Continental) files this "Change in Rate Schedule" effective January 31, 1963, as Supplement No. 7, to its FPC Gas Rate Schedule No. 115 which is on file with the Commission.

The following information is required by Section 154.94(f) of the Commission's Regulations:

1. Producer: Continental Oil Company, Post Office Box 2197, Houston 1, Texas
2. Buyer: United Gas Pipe Line Company
3. Location of sale: Johnson's Bayou, Cameron Parish, Louisiana
4. (a) FPC Gas Rate Schedule No. 115;
   (b) Basic Contract Date January 22, 1953
5. (a) Type of Increase: Unilateral
   (b) Contract Basis: Contract terminated as of January 31, 1963
   (c) Effective Date of Increase: January 31, 1963

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6. Rates in Cents per Mcf at 15.025 psia:

	Base Rate	Tax Reimbursement	Total Rate
(a) Present Effective Rate	8.9970¢	1.80¢	10.797¢
(b) Proposed Rate	14.00¢	1.75¢	15.75¢

7. Statement of estimated sales volume and comparative revenues for the twelve-month period succeeding the proposed effective date (shown with volume and rates at the same psia as in Item 6):

Estimated Volume (Mcf)	Revenues at Present Effective Rate	Revenues at Proposed Rate	Difference in Revenues
199,494	$21,539	$31,420	$9,881

The figures shown above reflect the volumes and revenues attributable to Continental's working interest only.

8. Average BTU content per cubic foot of the gas sold during the last twelve-month period: Not available; estimated for the succeeding twelve-month period: Not available.

Working interest in the Johnson's Bayou Field is as follows:

Continental Oil Company (Operator)	50%
Sohio Petroleum Company	50%

The contract between Continental, as Seller, and United Gas Pipe Line Company (United), as Buyer, dated January 22, 1953, which has heretofore been filed with the Commission as part of Continental's FPC Gas Rate Schedule No. 115, provides for a primary term of ten years beginning with the date of initial delivery (January 31, 1953), and further provides that said contract shall

continue for successive one-year periods unless terminated. However, either party may terminate the contract at the end of the primary term or at the end of any succeeding year by giving at least ninety (90) days' prior written notice to the other party of such termination.

After unsuccessful efforts to renegotiate the contract with United, Continental advised United by written notice dated October 23, 1962, that Continental elected to terminate the contract at the end of the primary term, on January 31, 1963. United acknowledged this notice of termination. The notice of termination and acknowledgment are attached as Exhibit "A" to this Change in Rate Schedule.

Pursuant to the certificate of public convenience and necessity issued to Continental by Commisison order on

January 4, 1956, and Continental's FPC Gas Rate Schedule No. 115, Continental proposes to continue the sale of gas to United from Johnson's Bayou Field covered under such certificate and rate schedule at the rate herewith filed by this Supplemnt No. 7 to said Rate Schedule.

The Supreme Court and this Commission have established and recognized the right of a natural gas company to file a unilateral change in rate with respect to a sale of natural gas subject to the jurisdiction of this Commission. See *United Gas Pipe Line Company* vs. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 79 Sup. Ct. 194 (1958); *United Gas Pipe Line Company* vs. *Mobile Gas Service Corporation*, 350 U.S. 332, 72 Sup. Ct. 373 (1956); *In the matters of Continental Oil Company, et al*, FPC Docket No. RI60-165. See also Section 154.94(f)(3) of the Commission's Regulations under the Natural Gas Act.

The change in rate set forth by this filing provides for a total rate of 15.75 cents per Mcf, inclusive of tax reimbursement, which is in accord with the applicable area rate level for South Louisiana indicated by the Commission's Statement of General Policy 61-1, as amended. This rate is at or below the level at which numerous other comparable sales of natural gas are

being made in South Louisiana. The Commission has approved numerous such sales in South Louisiana at this rate or at higher rates. Therefore, any rate less than the rate of 15.75 cents per Mcf proposed for the present sale would

be unjust, unreasonable and unduly discriminatory as to Continental, and the proposed rate is not unjust, unreasonable or unduly discriminatory. Accordingly, this change in rate should become effective as proposed, upon the date set forth or within thirty days after filing of this Change in Rate Schedule, whichever is later.

Therefore, Continental respectfully requests that this change in rate becomes effective on January 31, 1963, and remain in effect until lawfully changed.

A copy of this Change in Rate Schedule is being sent to the interested parties, as shown by the attached service list.

Communications with respect hereto should be sent to:

Mr. Fred B. Willson
Assistant Director
Natural Gas Activities
Continental Oil Company
Post Office Box 2197
Houston 1, Texas,

and

Mr. Bruce R. Merrill
Legal Department
Continental Oil Company
Post Office Box 2197
Houston 1, Texas.

Yours very truly,

Original Signed:
FRED B. WILLSON
Fred B. Willson
Assistant Director
Natural Gas Activities
Production Department

FBW/RPH-DD

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Exhibit "A"

CONTINENTAL OIL COMPANY
P. O. BOX 2197
HOUSTON 1, TEXAS

October 23, 1962

REGISTERED MAIL
RETURN RECEIPT REQUESTED

United Gas Pipe Line Company
P. O. Box 1407
Shreveport, Louisiana
Attention of Mr. T. L. Aubin, Jr.

Gentlemen: Re: Johnson's Bayou Field
Cameron Parish, Louisiana

This is with reference to the Gas Purchase Contract, dated January 22, 1953, by and between United Gas Pipe Line Company and Continental Oil Company, which provides for the sale and purchase of gas from Continental's interests in the Johnson's Bayou Field, Cameron Parish, Louisiana.

According to Article XIII of said Contract, the primary term thereof shall be for a period of ten (10) years from the date of commencement of deliveries, such date being January 31, 1953, and thereafter for successive periods of one year each; provided, however, that either party may terminate the Contract at the end of the primary term or any succeeding annual period by giving to the other party at least ninety (90) days prior written notice of the intention of the party giving such notice to terminate the Contract.

Continental Oil Company hereby gives notice to United that it elects to terminate said Contract as of the thirty-first day of January, 1963.

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Please acknowledge receipt of this notice by having one (1) copy signed on behalf of United Gas and returning it to this office.

Yours very truly,

CONTINENTAL OIL COMPANY
By D. L. FISHER
Vice President

Acknowledged this 7th
day of Nov., 1962.

UNITED GAS PIPE LINE COMPANY

By C. C. BARNETT
Vice-President

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STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared FRED B. WILLSON, who being by me first duly sworn, on oath deposes and says:

That he is the Assistant Director of Natural Gas Activities of CONTINENTAL OIL COMPANY; that he has read the foregoing "Change in Rate Schedule" and knows the contents thereof; that said "Change in Rate Schedule" was subscribed by him on behalf of said CONTINENTAL OIL COMPANY with full power and authority to do so; that the facts stated in said "Change in Rate Schedule" are true as stated except as to matters and things stated or indicated to be stated on informa-

tion and belief, and as to those matters and things, he believes them to be true.

Original Signed:
FRED B. WILLSON
Fred B. Willson

SWORN TO AND SUBSCRIBED before me, this 28th day of December, 1962.

Original Signed:
MARY R. MULLINS
Notary Public in and for
Harris County, Texas

My Commission expires
June 1, 1963

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the following named parties of record in this proceeding, by delivering a copy thereof in person, or by mailing a copy thereof properly addressed, to each of the parties named or, where indicated, to the attorney of record of a party named:

United Gas Pipe Line Company
Shreveport 92, Louisiana

Sohio Petroleum Company
1300 Skirvin Tower Hotel
Oklahoma City 2, Oklahoma

dated at Houston, Texas, this 28th day of December, 1962.

Original Signed:
FRED B. WILLSON
Fred B. Willson

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CONTINENTAL OIL COMPANY
BOX 2197
HOUSTON 1, TEXAS

December 31, 1962

Mr. J. H. Gutride, Secretary
Federal Power Commission
441 G Street, N.W.
Washington 25, D. C.

Re: Change in Rate Schedule
Continental's FPC Gas Rate
Schedule No. 115
Supplement No. 7
Johnson's Bayou Field
Cameron Parish, Louisiana

Dear Mr. Gutride:

In reference to the captioned Change in Rate Schedule which was filed by our letter of December 28, 1962, there is an incorrect docket reference appearing in the citations at page 3 of the Change in Rate Schedule. The correct docket citation for the Continental proceeding cited at this page should be "Docket No. RI60-165, In the Matters of Continental Oil Company (Operator), et al." Would you please include this letter as an errata to the rate schedule filing in this respect.

Copies of this letter are being sent to the parties upon which service of the Change in Rate Schedule was made.

Very truly yours,

TOM BURTON
Attorney

TB-HRM

cc: United Gas Pipeline Company
Shreveport 92, Louisiana
Sohio Petroleum Company
1300 Skirvin Tower Hotel
Oklahoma City 2, Oklahoma

Continental's Contract No. 4173—FPC Gas Rate Schedule No. 115 Johnson Bayou Field

Cameron Parish School Board Lease:

Continental Oil Company (Operator)	50%
Sohio Petroleum Company	50%

Copies mailed to:
United Gas Pipe Line Company
Shreveport 92, Louisiana

Sohio Petroleum Company
1300 Skirvin Tower Hotel
Oklahoma City 2, Oklahoma

Interoffice distribution to:
EAA-EHL

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Files (1)

Address all Communications
To the Secretary

FEDERAL POWER COMMISSION
WASHINGTON 25

January 25, 1963

IP No. 4567

Continental Oil Company
P. O. Box 2197
Houston 1, Texas

Gentlemen:

The rate schedules and supplements listed herein have been accepted for filing to be effective as of the date shown.

In the event that any of the documents comprising the listed rate schedules and supplements contains provisions for future automatic adjustments in rates and charges, your attention is directed to the fact that such provisions, when invoked to change the effective rates and charges, will constitute a change in such rates and charges within the meaning of Section 4 (d) of the Natural Gas Act and Section 154.94 of the Commission's Regulations under such Act. Any such changes should be filed with the Commission not more than 90 days nor less than 30 days prior to the proposed effective date thereof.

Further, in the event that any of the documents comprising the listed rate schedules and supplements was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

This acceptance for filing does not constitute authorization under Section 7 of the Natural Gas Act; nor shall it be construed as constituting approval of any rate or provisions contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

In future correspondence concerning the listed rate schedules and supplements, please refer to the FPC Gas Rate Schedule designation furnished you herewith, including the name of the independent producer and the rate schedule and supplement numbers.

Very truly yours,

J. H. GUTRIDE
J. H. Gutride
Secretary

Rate Schedule Designation—Continental Oil Company (Operator), et al.

Description of Document—Notice of Change 12-28-62

Date of Letter of Transmittal—12-28-62

FPC Gas Rate Schedule No. 115

Supplement No. 7

Effective Date—1-31-63

cc: United Gas Pipe Line Company
1525 Fairfield Avenue
Shreveport, Louisiana

BNG
Kilpatrick, J. M.:smj
1-24-63

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[Docketed February 1, 1963]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. C163-979

(Continental Oil Company FPC Rate Schedule 115)

In the Matter of:

CONTINENTAL OIL COMPANY

Petition for Order to Show Cause

Comes now Continental Oil Company (Continental), and respectfully petitions this Commission, pursuant to Sections 1, 4, 7 and 16 of the Natural Gas Act and of Section 1.6 of the Rules of Practice and Procedure, to issue its order directing United Gas Pipe Line Company (United) to show cause why it should not be required to continue to take deliveries of gas produced by Continental in the Johnson Bayou Field, Cameron Parish, Louisiana, under Continental's FPC Gas Rate Schedule 115 as supplemented, at the currently filed and effective rate therein provided, and order United to take such gas pending action on the order to show cause.

In support whereof, Continental would show the Commission as follows:

I.

Continental entered into a gas sales contract with United on January 22, 1953, which provided for the sale by Continental and purchase by United of gas produced from the

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Johnson Bayou Field, Cameron Parish, Louisiana. This contract was filed with the Commission as Continental's

FPC Gas Rate Schedule 115. In accordance with the provisions of this contract, Continental elected to terminate the contract at the end of the primary term on January 31, 1963 after having failed to negotiate a satisfactory new or amended contract. Upon notice to United of such termination, Continental filed as Supplement No. 7 to Rate Schedule 115, a unilateral rate increase providing for an effective price from and after January 31, 1963, of 15.75¢ per Mcf, inclusive of tax reimbursement.

The Commission on January 25, 1963, accepted Supplement No. 7 to Continental's Rate Schedule 115 to become effective without suspension on January 31, 1963.

II.

United stated in its formal Complaint and Protest filed with the Commission in response to Continental's unilateral rate filing that United would decline to purchase gas from Continental in accordance with Continental's lawfully filed and effective rate schedule, as supplemented.

After the Commission permitted Supplement No. 7 to Continental's Rate Schedule 115 to become effective in accordance

with Section 4 of the Natural Gas Act, United advised Continental by letter dated January 28, 1963, a copy of which is attached,[1] that United would discontinue the receipt of gas from Continental from the Johnson Bayou Field at 7:00 a.m. on January 31, 1963. Continental is required to deliver and sell gas to United in accordance with its Rate Schedule 115 and certificate issued to it in Docket No. G-6949. Continental has not sought authority to

[1] See also attached telegrams.

abandon such delivery and sale, nor has an abandonment order issued. United has not sought authority from the Commission to abandon the receipt and purchase of this gas, the sale of such gas to its customers, the abandonment of any facility or service in connection therewith, nor has any abandonment order issued. United's forcing a discontinuance of delivery, receipt, and sale of this gas, and the cessation of services and use of facilities in connection therewith on January 30, 1963, constitute violations of the Natural Gas Act under Section 7(b) thereof.

III.

The questions presented by this Petition are:

1. Can United lawfully cease taking deliveries from Continental so long as Continental is required to and/or desires to continue making deliveries under a lawfully filed and effective rate schedule and lawfully issued certificate?

2. Can United abandon the facilities by which it takes such deliveries or the service involved without

first securing, after hearing, the Commission's permission and approval for such abandonment?

Continental contends that United cannot so cease taking deliveries or abandon such facilities or service. United apparently contends that it can thus circumvent the Commission's regulation under the Natural Gas Act. Continental submits that the Natural Gas Act makes clear the rights and obligations of the parties in this case. Particularly Sections 1(a), 4(b) and 7(b) of the Act are in point.

Section 1(a) states that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest and that regulation thereof is necessary in the public interest. In view of this section, the inequity and folly of requiring a producer to continue sale and delivery of his natural gas, after termination of the contract under which such sale and delivery was initiated, with no corresponding requirement that the purchaser and transporter of such gas continue to purchase and transport such gas, is apparent. Both the producer and the transporter-purchaser are natural gas companies within the definition contained in the Act. Both are to be regulated in the public interest. Neither can serve the ultimate consumer without the other. How is the consumer served under a regulation that requires the

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producer to sell but does not require the purchaser to buy? If assurance of supply is a part of the logic underlying regulation, then it matters little to the consumer, who does not get the supply, whether it is the producer who can refuse to sell or the transporter-purchaser who can refuse to purchase, who is responsible.

Section 4(b) states:

> "No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission . . . . subject any person to any undue prejudice or disadvantage . . . ."

Continental's gas supply from the Johnson Bayou Field is committed to United until such time as the Commission, upon application, permits an abandonment of the certificated sale of this gas. To permit United to decline to take deliveries of this gas absent application for abandonment

and notice and hearing unduly prejudice Continental in that Continental would be deprived of its market and suffer possible loss of its leases, without due process of law.

Had Continental sought abandonment and been denied, could United nevertheless discontinue receipt and purchase of the gas, and sales, services and facilities in connection therewith, without authority from the Commission? This corollary question points to the answer that should be applied to the two questions directly here in issue.

The Commission has found the sale by Continental and the purchase by United of gas produced from the Johnson

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Bayou Field to be required by the public convenience and necessity. Moreover, in accepting Supplement No. 7 to Rate Schedule 115 without suspension implies that continuance of the sale according to its terms is in the public convenience and necessity.

Continental submits that United can neither cease taking this gas nor force Continental to cease producing and delivering the gas without United's having first sought and obtained, after hearing, the permission of the Commission in accordance with Section 7 of the Natural Gas Act. If United were to be able to cease taking this gas at its own discretion without first obtaining the permission of the Commission and complying with the requirements of the Natural Gas Act, United's customers and the public relying upon this gas would never have any assurance of a stable and continuing supply of gas. United would be substituting its judgment for the power and judgment of the Commission in determining whether the public interest requires the continuing sale and purchase of gas which the

Commission has already determined is required, and which the Act provides may not be discontinued without Commission authorization.

The authority of the Commission with respect to abandonment by either seller or purchaser of any sale or service subject to the Commission's regulation is clear beyond doubt.

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Section 7(b) of the Act states:

> "No natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permits such abandonment."

Both producers and transporters of natural gas in interstate commerce are natural gas companies within the meaning of the Act, and this section of the Act applies with equal force to both producers and to transporters.

United cannot argue that it has no facilities for the sale or transmission of gas in the Johnson Bayou Field subject to the jurisdiction of the Commission, or that to terminate the taking of gas by means of such facilities is not an abandonment of such facilities. Also, United's discontinuing of takes would constitute an abandonment of service rendered by United to the consuming public. It is only a matter of degree if United were to abandon a single purchase from one producer in one field, or two purchases in

the same or different fields from one or two producers, or three, four, five or a hundred such purchases. In the case of a single purchase in a single field, just as in the case of a hundred purchases in many fields, United is seeking to abandon without permission of the Commission and

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without a finding, upon hearing, that the public convenience and necessity permits such abandonment of a part of the gas supply and services upon which United's customers and the consuming public have come to rely and depend. This usurpation of the Commission's function in permitting abandonment of sales and services cannot be permitted.

The Supreme Court has clearly held in the *CATC* and *Sunray* cases[2] that gas once committed to sale in interstate commerce is committed even after the termination of the gas sales contract, and remians committed until the Commission authorizes abandonment under Section 7 of the Act. This being so, there is no mutuality of the obligation of buyer and seller unless buyer as well as seller is required to obtain permission for abandonment. If the law is as United contends, the seller has the obligation to continue to deliver, but the buyer has no obligation to continue to take. Conversely, the buyer has the right but not the obligation to continue to take. The obligations are all on the part of the seller, the rights and options are all on the part of the buyer.

If the pipeline buyer were not required to seek abandonment just as the producer is required to do, the producer would always be at the mercy of the pipeline in selling or not selling gas upon contract termination. In the case of large reserves, the pipeline normally would be expected to keep the reserve committed, but in the case

[2] 360 U.S. 1246; 364 U.S. 137.

of smaller reserves, where no other pipeline could economically justify installation of facilities, the pipeline buyer could refuse to take gas committed to the producer. In any such case, the pipeline would have the power to threaten the producer with disconnection to force a dictated price upon the producer.

United's threat to cease taking gas from Continental poses not only a violation of the Natural Gas Act by United, but also creates an urgent need for equitable relief by the Commission. The Commission should immediately issue an order that United show cause why it should not be required to continue taking gas from Continental, and to order United to take such gas pending action on the show cause order.

Wherefore, Continental prays that the Commission issue an order directing United to show cause why it should not be required to continue taking gas from Continental in accordance with Continental's Rate Schedule 115, as supplemented, and further order that United take such gas pending action on the order to show cause.

Respectfully submitted,

TOM BURTON
Tom Burton, *Attorney for*
Continental Oil Company

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[Received February 1, 1963]

STATE OF TEXAS
COUNTY OF HARRIS

Before me, the undersigned notary, personally appeared Tom Burton, who being by me duly sworn, stated on his oath that the facts contained in the foregoing Petition are true to the best of his knowledge and belief.

TOM BURTON
Tom Burton

Subscribed and sworn to before me this 31st day of January, 1963.

HALLIE R. MADELEY
Notary Public in and for
Harris County, Texas

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of January 1963 served a copy of the foregoing Petition upon the United Gas Pipe Line Company, Shreveport, Louisiana, by depositing the same in the United States Mail postpaid.

TOM BURTON
Tom Burton

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[Received February 1, 1963]

UNITED GAS PIPE LINE COMPANY
SHREVEPORT, LOUISIANA

January 28, 1963

REGISTERED MAIL
RETURN RECEIPT REQUESTED
Continental Oil Company
P. O. Box 2197
Houston 1, Texas

Re: United Gas Pipe Line Company's
Gas Purchase Contract No. 1551
Continental Oil Company
Johnson Bayou Field
Cameron Parish, Louisiana

Gentlemen:

Continental Oil Company, in its letter of October 23, 1962 (signed by O. L. Fisher, Vice President), advised United Gas Pipe Line Company of its election to cancel the captioned contract on January 31, 1963. Such cancellation is provided for in Article XIII of the contract.

By letter of December 26, 1962, United submitted to Continental for its execution an agreement, executed by United, providing for the purchase of gas from Continental in the Johnson Bayou Field after the termination of the captioned contract. This offer was rejected by Continental in its letter to United of December 28, 1962.

This letter is to notify you that United Gas Pipe Line Company will discontinue the receipt of gas from Continental Oil Company in the Johnson Bayou Field at 7:00 A.M. on January 31, 1963.

(300)

In the event you should desire to continue to deliver gas under the provisions of the contract we submitted to you on December 26, 1962, please advise us.

Very truly yours,

UNITED GAS PIPE LINE COMPANY

C. C. BARNETT
Vice President

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RECEIVED FEB 1, 1963
FEDERAL POWER COMMISSION
WIRE MESSAGE

Teletype ☐ Filed———
Time
Telegram ☒ No.———

Please send following message, subject to the terms of your company, which are hereby agreed to:

HOUSTON, TEXAS
JANUARY 30, 1963

C. C. Barnett

UNITED GAS PIPE LINE COMPANY
1525 FAIRFIELD AVENUE
SHREVEPORT, LOUISIANA

RE YOUR LETTER OF JANUARY 28, 1963. PLEASE BE ADVISED THAT FPC HAS ACCEPTED OUR UNILATERAL RATE INCREASE AS SUPPLEMENT NO. 7 TO RATE SCHEDULE NO. 115. THAT BEING THE ONLY LAWFULLY FILED RATE YOU ARE REQUIRED TO CONTINUE TO TAKE DELIVERY AT SUCH RATE.

BRUCE R. MERRILL
CONTINENTAL OIL COMPANY

BRM-HRM
4:50 p.m.
Chge: FPC

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WESTERN UNION TELEGRAM

WUA108 PD FAX SHREVEPORT LA JAN 31 1101 A CST
BRUCE R MERRILL, LEGAL DEPT
CONTINENTAL OIL CO

REURTEL JANUARY 30, 1963, WITH RESPECT TO UNITED DISCONTINUING RECEIPT OF GAS FROM CONTINENTAL IN THE JOHNSON BAYOU FIELD, CAMERON PARISH, LOUISIANA. UNITED HAS, AS SET FORTH IN ITS LETTER TO CONTENENTAL OF JANUARY 28, 1963, DICONTINUED THE RECEIPT OF GAS FROM CONTINENTAL IN THE JOHNSON BAYOU FIELD EFFECTIVE 7:00 AM ON JAN 31 1963

UNITED GAS PIPE LINE CO BY C C BARNETT VICE PRESIDENT

1155AMC

30 1963 28 1963 7:00 AM 31 1963.

RECEIVED FEB 1, 1963
FEDERAL POWER COMMISSION

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[Docketed February 27, 1963]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CI63-979

(Continental Oil Company F.P.C. Rate Schedule 115)

IN THE MATTER OF
CONTINENTAL OIL COMPANY

Answer of United Gas Pipe Line Company to Petition by Continental Oil Company for Order to Show Cause

COMES NOW, UNITED GAS PIPE LINE COMPANY (United) and in response to the pleading designated Petition For Order To Show Cause filed by Continental Oil Company (Continental) denies that Continental has any right to petition this Commission to issue a show cause order.

Treating the petition as a formal complaint by Continental against United, United answers as follows:

1.

United admits the allegations of fact contained in Article I of Continental's petition and admits the letter dated January 28, 1963, and the telegrams dated January 30, 1963, and January 31, 1963, attached to the petition are correct copies of the originals. United denies all other allegations of fact and conclusions of law contained

in Continental's petition except such as are hereinafter admitted.

Further answering, United shows:

2.

On January 22, 1953, United and Continental executed a contract under which Continental delivered and sold gas to United from the Johnson Bayou Field, Cameron Parish, Louisiana. That contract provided for an effective rate of 8.9970¢ per Mcf at 15.025 p.s.i.a., plus tax reimbursement amounting to 1.8¢ per Mcf from and after January 31, 1958. The contract was for a primary term of 10 years from January 31, 1953, and would automatically continue in effect after the expiration of the primary term for successive periods of one year each, provided, however, that either party might terminate the contract at the end of the primary term or any succeeding annual period by giving the other party 90 days prior written notice. Sales were initiated under this contract and were continued until January 31, 1963.

3.

After the Federal Power Commission undertook active regulation of producer sales, Continental filed the said con-

tract of January 22, 1953, with the Federal Power Commission as its Rate Schedule No. 115 and sought and obtained from this Commission at Docket No. G-6949

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a certificate of public convenience and necessity authorizing it to deliver and sell natural gas to United under the terms of the said contract.

4.

By letter dated October 23, 1962, Continental advised United that it elected to terminate said contract as of January 31, 1963, the end of the primary term.

5.

On November 21, 1962, representatives of Continental contacted representatives of United requesting that United agree to a new contract with Continental covering the Johnson Bayou Field gas specifying, among other things, a new term of 20 years and an increased price of 14¢ per Mcf, plus 1.75¢ per Mcf tax reimbursement. The parties did not reach an agreement on Continental's proposal. United in turn advised Continental it would actively support an application by Continental to the Federal Power Commission for an abandonment of this service by Continental since United did not currently need deliveries of this gas, and that, in the meantime, United would agree contractually to continue buying Johnson Bayou Field gas on a day to day basis at the existing contract price. Attached hereto as Exhibits "A", "B" and "C", respectively, are letters dated December 17, 1962, December 20, 1962, and December 26, 1962, relating thereto.

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6.

Continental advised United that it would neither accept United's proposed contract nor file an application with this

Commission asking authority to abandon the sale. It advised it would insist on the price it had proposed and would unilaterally file that rate with this Commission as a change in rate applicable to this gas. Attached hereto as Exhibit "D" is a letter dated December 28, 1962, relating thereto.

7.

On December 28, 1962, Continental filed with this Commission a notice that it was unilaterally increasing the rate applicable to the Johnson Bayou Field gas to 14¢ per Mcf at 15.025 p.s.i.a., plus tax reimbursement of 1.75¢ per Mcf, and requested that the increased rate be made effective on and after January 31, 1963. On January 18, 1963, United filed with this Commission its formal complaint protesting Continental's unilateral rate filing and asking that it be rejected. By letter dated January 25, 1963, addressed to Continental the Commission advised that the increased rate had been accepted for filing with an effective date of January 31, 1963.

8.

United is today and has been for some time in the position of having deliverable supplies of gas available to it in South Louisiana

under contracts which require it to take or pay for quantities which exceed its current requirements from the area. As a result United is and has been paying for large quantities of gas it could not currently take. Under these circumstances, in order to avoid buying gas it did not currently need and because Continental had elected to terminate the contract under which deliveries of gas had been made, United advised Continental that it would discontinue receipts of Johnson Bayou Field gas from Continental on January 31, 1963.

9.

Further answering, United vigorously denies Continental's charges that United has violated the Natural Gas Act and circumvented the Commission's regulations. Continental's statement that United has abandoned facilities and service is false. United has not and does not intend to abandon any facilities or service it renders as a result of actions taken to date covering Johnson Bayou Field gas.

10.

United has in good faith exercised the right, recognized by the Supreme Court of the United States, to purchase only as its needs require under Continental's unilaterally imposed ex parte arrangement. Continental's prejudicial accusations against United reflects Continental's refusal to accept the consequences of its own actions. Continental

cancelled the contract which otherwise would have been in effect today; Continental refusal to apply for an abandonment which United said it could and would support; Continental refused to accept United's offer to continue purchases at the contract price; Continental chose an ex parte relationship; and Continental unilaterally filed a price United had declined to agree to. Having turned its back on a contractual relationship with United, Continental seeks to force United to today buy gas offered by Continental on its unilaterally fixed terms. Because of its take-or-pay-for problem, United does not today need deliveries under Continental's ex parte arrangement and Continental cannot force United to accept such deliveries.

11.

United disagrees completely with Continental that the questions presented by these facts are those set out in

Article III of Continental's petition for order to show cause. The question which is presented is:

> Can Continental, under its ex parte arrangement, force United to today accept deliveries of gas which United does not today need or want, in quantities specified by Continental, and to pay therefor a price unilaterally established by Continental over United's objection?

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Continental points to no statutory authority giving it such a right because none exists.

If, as Continental contends, the Natural Gas Act can be employed by Continental to force United to today accept deliveries of gas it does not need, in quantities acceptable to Continental, under terms and conditions unstated and unknown to United, and to pay therefor a rate unilaterally established by Continental over the objection of United, then the Act is to that extent unconstitutional.

Many of United's customers are private industries and gas sold these industries must compete directly with fuel oil, coal and other gas supplies. These industries are required to buy from United, or to refrain from doing so, as their contracted arrangements with United permit. United cannot force these industries to buy gas, or to pay prices, beyond their contractual commitments.

Most of United's remaining customers are distributors who likewise are required to buy from United, or refrain from doing so, as their contractual arrangements with United permit. United cannot force these distributors to buy gas, or to pay prices, beyond their contractual commitments.

The Natural Gas Act guarantees United no markets or no return.

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United is, as it obviously must be, vitally concerned with maintaining its markets and making a reasonable return. If United has no control over what it must pay for gas, and Continental can dictate how much it must buy and what it must pay, then it is in no position to keep its markets, or to realize a reasonable return. Any order forcing United to so purchase gas would constitute a taking of United's properties without adequate compensation and the due process guaranteed by the Constitution of the United States.

12.

Further answering, United shows that Continental is incorrect in assuming that its obligation to sell imposes a corresponding obligation on United to buy. Continental cancelled the existing contractual arrangement, refused United's offer to continue buying on the basis of the existing contract, refused to apply to this Commission for authority to abandon the sale, and unilaterally established a price to which United had refused to agree. Assuming Continental's right to do these things, Continental can point to no contractual agreement, or authority in the Natural Gas Act, requiring United to purchase any particular quantities of gas from Continental at any particular time. Having divested itself of its contractual arrangement with United and imposed an ex parte arrangement, Continental is left

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in the position of offering its gas to United and United is free to purchase it when and if it is needed by United.

13.

If Continental can force United to accept deliveries of its gas, after having voluntarily and deliberately cancelled

the contract under which deliveries of gas were being made, then a host of questions are presented by these proceedings, among them being:

(a) What price must United pay?

(b) What volumes must United take?

(c) What maximum volume may United take in any day?

(d) What delivery capacity must Continental maintain?

(e) At what pressure must Continental deliver?

(f) What quality specifications must Continental meet?

(g) Can Continental be required to dehydrate the gas?

(h) Can Continental be required to compress the gas?

(i) On what basis will the gas be measured?

(j) What development must Continental accomplish?

(k) Can Continental process the gas to remove hydrocarbons?

(l) Under what conditions will Continental or United be relieved temporarily of their obligations?

All these and other questions are presented including: who establishes

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these and related terms and can they be changed and by whom?

14.

United doesn't today need deliveries of Continental's gas to supply its customers, and if it is today forced to accept deliveries, it will have to cut back on other sources and pay for gas it cannot take. This is not in the public's or United's interest.

Continental has refused to accept United's statement of these facts and declined to apply to this Commission for authority to abandon its sale to United. It has insisted on maintaining its position that it is forced to sell its gas to United. This position is Continental's choice and until and unless it takes action to be relieved of that position its complaint is premature.

WHEREFORE, United prays that Continental's petition be rejected and dismissed.

UNITED GAS PIPE LINE COMPANY

By C. C. BARNETT
Vice President

Counsel for
United Gas Pipe Line Company:

Wilbert O. Crain
Saunders Gregg
David Klotz
1525 Fairfield Avenue
Shreveport, Louisiana

Vernon W. Woods
Willis L. Meadows
P. O. Box 1707
Shreveport, Louisiana

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STATE OF LOUISIANA
PARISH OF CADDO

Personally came and appeared before me the undersigned, duly qualified and acting Notary Public, C. C. BARNETT, who being by me, Notary, first duly sworn, deposes and says:

That he is Vice President of United Gas Pipe Line Company; that he has read the foregoing answer and knows

the matters of fact set forth therein are true and correct to the best of his knowledge and belief.

C. C. BARNETT
C. C. Barnett

SWORN TO AND SUBSCRIBED before me on this the 26th day of February, 1963.

VERNON W. WOODS
Notary Public in and for
Caddo Parish, Louisiana

(SEAL)

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Exhibit "A"

UNITED GAS PIPE LINE COMPANY
SHREVEPORT, LOUISIANA
DECEMBER 17, 1962

Continental Oil Company
P. O. Box 2197
Houston 1, Texas

Attention: Mr. C. E. Lamb

Gentlemen:

This letter is with reference to the Gas Purchase Contract of January 22, 1953, as amended, between Continental Oil Company and United Gas Pipe Line Company covering the sale and purchase of gas in the Johnson Bayou field, Cameron Parish, Louisiana. This contract provides for a primary term extending to January 31, 1963, and for successive secondary terms of one (1) year each; subject to cancellation by either Continental or United at the end of the primary term or any succeeding annual period upon ninety (90) days prior written notice to the other party.

Continental, by letter of October 23, 1962, canceled this contract effective as of January 31, 1963. On November

21, 1962, you contacted United requesting that we agree to enter into a new twenty (20) year contract with you in the Johnson Bayou Field commencing at a price of 14¢ per Mcf plus 1.75¢ per Mcf tax reimbursement.

As we discussed with you during our meeting of December 13, 1962, we have reviewed your recent contract proposal, and we wish to advise that at this time we have no need for this gas because the gas supply now under contract to United is adequate to supply our present market requirements. Because of this condition, we also wish to advise that we intend to support your filing with the Federal Power Commission for abandonment of service.

Very truly yours,

s/ T. L. Aubin, Jr.
T. L. Aubin, Jr.

TLA:lj

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Exhibit "B"

UNITED GAS PIPE LINE COMPANY
SHREVEPORT, LOUISIANA
DECEMBER 20, 1962

Continental Oil Company
P. O. Box 2197
Houston 1, Texas

Attention: Mr. C. E. Lamb

Re: United Gas Pipe Line Company's
Gas Purchase Contract No. 1551
Johnson Bayou Field
Cameron Parish, Louisiana

Gentlemen:

This is with reference to our letter to you of December 17, 1962, with respect to Continental's election to cancel

the captioned contract on January 31, 1963, and United's advice therein that it intends to support Continental's filing with the Federal Power Commission for abandonment of service.

This will confirm United's prior verbal advice to you in our meeting of December 13, 1962, that United is willing to continue to receive such gas subsequent to the expiration date of the captioned contract in accordance with the terms and provisions of such contract for the benefit of Continental until Continental obtains authority from the Federal Power Commission to abandon service to United. Accordingly, if Continental desires to continue delivering gas to United from the Johnson Bayou Field on a day-to-day basis from and after January 31, 1963, United is willing to continue to receive such gas in accordance with the terms and provisions of the captioned contract, including the price and tax reimbursement provisions set forth therein.

Very truly yours,

s/ T. L. AUBIN, JR.
T. L. Aubin, Jr.

REGISTERED MAIL
RETURN RECEIPT REQUESTED

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Exhibit "C"

UNITED GAS PIPE LINE COMPANY
SHREVEPORT, LOUISIANA
DECEMBER 26, 1962

Continental Oil Company
P. O. Box 2197
Houston 1, Texas

Re: United Gas Pipe Line Company's
Gas Purchase Contract No. 1551
Johnson Bayou Field
Cameron Parish, Louisiana

Gentlemen:

Please refer to our letter to you of December 20, 1962, wherein we advise that if you desire to continue delivering gas to us from the Johnson Bayou Field on a day-to-day basis from and after January 31, 1963, we are willing to continue to receive such gas in accordance with the terms and provisions of the captioned contract, including the price and tax reimbursement provisions set forth therein.

This letter will evidence the agreement between Continental Oil Company (Continental) and United Gas Pipe Line Company (United) that, from and after January 31, 1963, Continental agrees to sell and deliver to United, and United agrees to purchase and receive from Continental, on a day-to-day basis, under and in accordance with the terms and provisions of the captioned contract, including the price and tax reimbursement provisions set forth therein, the gas produced from the lands and leaseholds covered by said contract; it being understood that upon one (1) day's notice, either Continental or United can terminate this agreement.

(316)

If the foregoing correctly sets forth your understanding with regard to the matter set forth herein, please indicate your acceptance on

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the duplicate originals hereof in the space provided below, and return one of the originals to us for our files, thus constituting this letter an agreement between the parties hereto.

Very truly yours,

UNITED GAS PIPE LINE COMPANY

s/ C. C. BARNETT
Vice President

Accepted and Agreed to:

CONTINENTAL OIL COMPANY

By .....
Vice President

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Exhibit "D"

CONTINENTAL OIL COMPANY
P. O. BOX 2197
HOUSTON 1, TEXAS
DECEMBER 28, 1962

United Gas Pipe Line Company
P. O. Box 1407
Shreveport, Louisiana

Attention of Mr. T. L. Aubin

Gentlemen:

We wish to acknowledge receipt of your letter of December 26, 1962, and the attached letter agreement pertain-

ing to the gas purchase and sale agreement covering our interest in Johnson Bayou Field, Cameron Parish, Louisiana.

As you were previously advised, we have elected to file for a rate increase for gas delivered to United from this field. Copies of our filing have been furnished United under separate cover.

Yours very truly,

s/ C. E. LAMB
C. E. Lamb
Regional Coordinator of
Natural Gas Activities
Southern Region

CEL-IC

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CERTIFICATE OF SERVICE

* * * * * * * * * * *

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Docket No. CI63-979

CONTINENTAL OIL COMPANY

Order to Show Cause

(Issued May 1, 1963)

Continental Oil Company, Houston 1, Texas, filed on February 1, 1963, a petition to the Federal Power Commission and a supporting brief requesting that the Commis-

sion issue an order directing United Gas Pipeline Company (United), Shreveport, Louisiana, to show cause why it should not be required to continue to take deliveries of gas produced by Continental in the Johnson Bayou field, Cameron Parish, Louisiana, under Continental's FPC Gas Rate Schedule 115 as supplemented, and order United to take such gas pending action on the order to show cause.

United filed on February 27, 1963, an answer and a brief in opposition to Continental's petition. Continental filed a reply brief on March 14, 1963.

The relevant facts on which the parties rely, as stated in their respective filings, are that Continental and United executed on January 22, 1953, a contract which provided for the sale by Continental and the purchase by United of gas produced from the Johnson Bayou field, Cameron Parish, Louisiana, at a price of 10.797¢ per Mcf, including 1.8¢ tax reimbursement. That contract was filed with the Commission as Continental's FPC Gas Rate Schedule No. 115 and the Commission issued to Continental, under Docket No. G-6949, a certificate of public convenience and necessity authorizing Continental to sell and deliver natural gas to United under the terms of the contract. The contract was for a primary term of 10 years and would automatically continue in effect thereafter for successive periods of one year each with the provision that either party might terminate the contract at the end of the primary term or any succeeding annual period by giving to the other party 90 days prior written notice.

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By letter dated October 23, 1962, Continental notified United that it elected to terminate the contract as of January 31, 1963, the end of the primary term.

In November, 1962, Continental requested United to agree to a new contract covering the Johnson Bayou field gas for

a term of 20 years at an increased price of 15.75¢ per Mcf, including 1.75¢ tax reimbursement, to become effective January 31, 1963. The parties did not reach agreement on the proposed new contract.

United informed Continental that it would actively support an application by Continental to the Federal Power Commission to abandon this service since United did not currently need this gas and, in the meantime, United would agree to continue buying Johnson Bayou field gas on a day-to-day basis at the existing contract price. The parties did not reach agreement on United's proposal.

On December 28, 1962, Continental filed Supplement No. 7 to its Gas Rate Schedule No. 115 providing for a unilateral rate increase from 10.797¢ to 15.75¢ per Mcf, including tax reimbursement, which the Commission accepted on January 25, 1963, over United's protest, to become effective January 31, 1963.

By letter dated January 28, 1963, United notified Continental that it would discontinue the receipt of gas from Continental in the Johnson Bayou field at 7:00 a.m. on January 31, 1963. United said that sales under the contract of January 22, 1953, with Continental were continued until January 31, 1963.

Continental's petition presents the question of whether the Natural Gas Act and the Commission's Rules and Regulations thereunder require United to apply for and obtain the Commission's permission and approval before ceasing the operation of all or any portion of the facilities heretofore utilized to purchase from Continental natural gas produced in the Johnson Bayou field and whether the termination by United of its purchase of gas from Continental constitutes in whole or in part an abandonment of service. We have not heretofore decided a case in which this issue has been presented.

(321)

We find it necessary and appropriate in carrying out the provisions of the Natural Gas Act, therefore, that United show cause, as hereinafter ordered, why it should not file with the Commission an application for abandonment authorization pursuant to Section 7 (b) of the Natural Gas Act and the Commission's Rules and Regulations thereunder.

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Natural gas companies and state and municipal regulatory bodies having jurisdiction to regulate rates and charges for the sale of natural gas which desire to file briefs and participate otherwise in this proceeding are invited to intervene.

The Commission orders:

(A) United Gas Pipeline Company shall appear and show cause, if any there be, at the hearing directed in paragraph (B) hereof, why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental Oil Company from Johnson Bayou field, Cameron Parish, Louisiana.

(B) A public hearing on the question of whether or not United is required by the Natural Gas Act or the Commission's Rules and Regulations under the Act to apply for the Commission's permission and approval as aforesaid, will be held in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington 25, D. C., commencing June 3, 1963, at 10:00 a.m. EDT.

(C) United shall file with the Commission on or before May 21, 1963, an answer in writing, pursuant to Sections 1.9 (c), 1.15 and 1.16 of the Commission's Rules of Practice and Procedure, in the nature of a brief stating, among

other things, United's position on the subject of this order and also the points of law, arguments, and authorities on which it relies.

(D) Notices and petitions to intervene and protests may be filed with the Commission in accordance with Sections 1.8 and 1.10 of the Commission's Rules of Practice and Procedure on or before May 14, 1963. Interveners shall file with the Commission and serve on all parties on or before May 21, 1963, briefs setting forth their respective positions on the subject matter of this order and also the points of law, arguments, and authorities on which they, respectively, rely.

By the Commission.

J. H. GUTRIDE,
Joseph H. Gutride,
Secretary.

(SEAL)

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[Docketed May 14, 1963]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CI63-979

CONTINENTAL OIL COMPANY

Petition to Intervene of Texas Eastern Transmission Corporation

Now comes Petitioner, Texas Eastern Transmission Corporation (Texas Eastern), pursuant to the provisions of the Natural Gas Act, as amended, and Sections 1.8 and 1.10 of the Commission's Rules of Practice and Procedure, and petitions the Commission for permission to intervene

in the above-entitled proceeding. In support of this petition, Texas Eastern respectfully shows the following:

1.

Texas Eastern is a Delaware corporation with its principal place of business in the Southern National Bank Building, Houston, Texas.

2.

The name, title and mailing address of the person to whom correspondence and communications concerning this petition are to be addressed is:

Jack D. Head
Vice President and General Counsel
Texas Eastern Transmission Corporation
P. O. Box 2521
Houston 1, Texas

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Copies should be sent to:

Keith M. Pyburn, Attorney
Texas Eastern Transmission Corporation
Suite 852, 425 - 13th Street, N. W.
Washington, D. C.

3.

Texas Eastern is a natural gas company which owns and operates, among other properties, a natural gas transmission system extending from Texas, Louisiana, and Mississippi through the Appalachian area to the Eastern Seaboard in the Newark-New York area. Texas Eastern purchases substantial quantities of natural gas from United Gas Pipe Line Company (United) which has been ordered to appear and show cause in the above captioned docket

why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of facilities heretofore operated by United to purchase natural gas from Continental Oil Company. Texas Eastern also purchases substantial quantities of gas from a large number of independent producers in Texas, Louisiana, and Mississippi.

4.

As a customer of United and as a purchaser of gas from Independent Producers, Texas Eastern has a direct and substantial interest in the issues presented in this proceeding which will be directly affected and which is not adequately represented by existing parties, and the public interest requires that Texas Eastern be permitted to intervene.

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WHEREFORE, Texas Eastern respectfully prays that it be permitted to intervene in the above-entitled proceeding, to have notice of and to appear at all hearings, to produce evidence and witnesses, to cross examine, and to be heard by counsel or other representatives upon brief and oral argument, if oral argument be granted, and for such other relief to which it may be entitled.

Respectfully submitted,

TEXAS EASTERN TRANSMISSION CORPORATION

By JACK D. HEAD
Jack D. Head
Vice President and General Counsel

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VERIFICATION

STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared Jack D. Head, who, being by me first duly sworn, on oath deposes and says:

That he is Vice President and General Counsel for Texas Eastern Transmission Corporation in the foregoing Petition to Intervene of Texas Eastern Transmission Corporation; that as such, he is authorized to verify and file the same with the Federal Power Commission; that he has read said Petition to Intervene and is familiar with the contents thereof; and that all averments of fact therein contained are true to the best of his knowledge, information and belief.

JACK D. HEAD
Jack D. Head

SWORN TO AND SUBSCRIBED before me on this the 13th day of May, 1963.

FLORRIS H. PLOWMAN
Florris H. Plowman
Notary Public in and for
Harris County, Texas
My Commission Expires June 1, 1963

(SEAL)

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CERTIFICATE OF SERVICE

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[Docketed May 14, 1963]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. CI63-979

In the Matter of:

CONTINENTAL OIL COMPANY

Statement of Position of Petitioner

Now comes Continental Oil Company, Petitioner in the above proceeding, and submits this Statement of Position and indicates its interest in participation in these proceedings. In support thereof, Continental would show that its position in the proceeding is that of Petitioner or Relator seeking of the Commission an order to show cause directed against United Gas Pipeline Company requiring United to continue to take gas under Continental's Rate Schedule No. 115 covering the sale of gas by Continental to United from the Johnson Bayou Field, Cameron Parish, Louisiana.

The Commission by order issued May 1, 1963, directed United to show cause why United should not first apply for and obtain permission and approval of the Commission for abandonment before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental from the Johnson Bayou Field. Continental is in accord with

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the Commission's order in this proceeding, and we believe that the Commission has recognized the issue presented by Continental's petition. The show-cause order which the Commission has directed to United should present the

matter at issue so as to permit a definitive resolution of United's obligation to take gas under Continental's unilateral rate filing.

However, the show-cause order as thus constituted should require United not only to show cause why it should not continue operating facilities related to the sale and purchase of Johnson Bayou gas, but also why United should not continue the service involved in the purchase of such gas, unless permission and approval of the Commission to abandon such facilities and service is first had and obtained.

Upon final order in the show-cause proceeding thus constituted, the Commission can and should further grant the full relief requested by Continental that United be required to continue taking gas from the Johnson Bayou Field. Continental would only submit at this time that United has not applied for or sought abandonment of the service involved in the sale and purchase of gas from the Johnson Bayou Field or facilities related thereto. The present proceeding on an order to show cause is not an abandonment proceeding and cannot, of itself, relieve

United in any manner of its obligation to continue to take gas which Continental is obligated to sell.

Continental's position is fully set out in its Petition for Order to Show Cause and Initial Brief and Reply Brief in support thereof previously filed in these proceedings, and to which reference is here made.

Respectfully submitted,

TOM BURTON
Tom Burton, Attorney for
CONTINENTAL OIL COMPANY

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AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared TOM BURTON, who, being duly sworn, on oath deposes and says: That he is an attorney for Continental Oil Company; that he has prepared and read the foregoing Statement of Position, and is authorized to sign it on behalf of Continental Oil Company; and that the facts stated therein are true to the best of his information, knowledge, and belief.

TOM BURTON
Tom Burton

Sworn to and subscribed before me, this 10th day of May, 1963.

HALLIE R. MADELEY
Notary Public in and for
Harris County, Texas

(SEAL)

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CERTIFICATE OF SERVICE

* * * * * * * * * * *

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Docketed May 20, 1963

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Docket No. CI63-979

In the Matter of

CONTINENTAL OIL COMPANY

Answer in the Nature of a Brief of United Gas Pipe Line Company to Order to Show Cause

* * * * * * * * * * *

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COMES NOW, UNITED GAS PIPE LINE COMPANY (United) and for answer to the order to show cause, issued herein on May 1, 1963, respectfully shows:

1.

The facts recited in the first eight paragraphs of the Commission's order are correct, except the price offered by Continental as a basis for a new contract is not there set out in full. Also United here relies on facts in addition to those recited in the order. A more complete statement thereof follows.

2.

On January 22, 1953 United and Continental executed a contract under which Continental delivered and sold gas to United from the Johnson Bayou Field, Cameron Parish, Louisiana.

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That contract provided for an effective rate of 8.9970¢ per Mcf at 15.025 p.s.i.a., plus tax reimbursement amounting to 1.8¢ per Mcf, from and after January 31, 1958. The contract was for a primary term of 10 years from January 31, 1953, and would automatically continue in effect after the expiration of the primary term for successive periods of one year each, provided, however, that either party might terminate the contract at the end of the primary term or any succeeding annual period by giving the other party 90 days prior written notice. Sales were initiated under this contract and were continued until January 31, 1963.

3.

After the Federal Power Commission undertook active regulation of producer sales, Continental filed the said contract of January 22, 1953, with the Federal Power Commission as its Rate Schedule No. 115 and sought and obtained from this Commission at Docket No. G-6949 a certificate of public convenience and necessity authorizing it to deliver and sell natural gas to United under the terms of the said contract.

4.

By letter dated October 23, 1962, a copy of which is attached hereto as Exhibit "A", Continental advised United that it elected to terminate said contract as of January 31, 1963,

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the end of the primary term.

5.

On November 21, 1962, representatives of Continental contacted representatives of United requesting that United

agree to a new contract with Continental covering the Johnson Bayou Field gas specifying, among other things, a new term of 20 years and an increased price. The increased price was to begin at a level of 14¢ per Mcf, plus 1.75¢ per Mcf tax reimbursement, for the first five years and thereafter the price would increase 1¢ per Mcf each 5 years; provided, the seller could charge the applicable price determined by the Commission in its area rate proceeding if that price were higher than the contract price. United did not then need deliveries of this gas and was not willing to pay the increased price and the parties did not reach agreement on Continental's proposal. United in turn advised Continental it would actively support an application by Continental to the Federal Power Commission for abandonment of this service and that, pending action thereon, United would agree to continue buying Johnson Bayou Field gas on a day to day basis at the existing contract price. Attached hereto as Exhibits "B", "C" and "D", respectively, are letters dated December 17, 1962, December 20, 1962, and December 26, 1962, relating thereto.

6.

Continental advised United that it would not accept United's proposal and would not file an application with this Commission asking authority to abandon the sale. It advised it would insist on the price it had proposed and would unilaterally file that rate with this Commission as a change in rate applicable to this gas. Attached hereto as Exhibit "E" is a letter dated December 28, 1962, relating thereto.

7.

On December 28, 1962, Continental filed with this Commission a notice that it was unilaterally increasing the rate

applicable to the Johnson Bayou Field gas to 14¢ per Mcf at 15.025 p.s.i.a., plus tax reimbursement of 1.75¢ per Mcf, and requested that the increased rate be made effective on and after January 31, 1962. On January 18, 1963, United filed with this Commission its formal complaint protesting Continental's unilateral rate filing and asking that it be rejected. By letter dated January 25, 1963, addressed to Continental the Commission advised that the increased rate had been accepted for filing with an effective date of January 31, 1963.

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8.

United is today and has been for some time in the position of having deliverable supplies of gas available to it in South Louisiana under contracts which require it to take or pay for quantities which exceed its current requirements from the area. As a result United is and has been paying for large quantities of gas it could not currently take. Under these circumstances, in order to avoid buying additional gas at a higher price and because Continental had elected to terminate the contract under which deliveries of gas had been made, United advised Continental that it would discontinue receipts of Johnson Bayou Field gas from Continental on January 31, 1963. Had Continental not terminated the contract, United would not have elected to terminate it but would have been willing to continue taking the gas under the terms of the contract, including the price therein set forth.

9.

On the effective date of Continental's termination of the contract, i.e. January 31, 1963, United discontinued receipts of Johnson Bayou Field gas from Continental and has not received any since that date.

10.

The Johnson Bayou Field is located in Cameron Parish in Southwest Louisiana. To accomplish the sale to United of

gas produced in this field, Continental delivered the gas to United's existing 16-inch transmission line extending westward from the area of the Mud Lake Field in Southwest Louisiana into the Beaumont, Texas, area. In order to make the gas suitable for efficient pipeline transmission, to meter it and to receive it into its line, United constructed a separator, a meter station and 55 feet of 4-inch line which it joined into its Mud Lake line, all at a total original cost of $6,884.68.

11.

The gas delivered into the Beaumont area is sold directly to industries for their use and to distributors for resale. None of these purchasers are subject to the jurisdiction of the Federal Power Commission and the Federal Power Commission cannot require any one of them to continue purchasing any gas from United.

12.

United is faced with active competition from other gas suppliers, particularly producers, for markets in the Gulf Coast area. For various reasons, including avoidance of federal regulation, many of those with available gas supplies in Texas and Louisiana have been aggressively seeking intrastate outlets through which to market their gas. United has lost very substantial markets in Texas and Louisiana to such competition.

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13.

The Federal Power Commission has assigned United no exclusive service area. The Commission does not and cannot exercise any control over United's intrastate competition which is uninhibited by any requirement for certificate authorization from any authority.

14.

United has numerous gas purchase contracts many of which expire or can be cancelled in the near future. If on the expiration or cancellation of those contracts, United is compelled to continue purchasing the same quantities of gas required by the contracts, but the producers are at liberty to increase the price United must pay over United's protest and objection as Continental has here sought to do, then to that extent has United's property been taken from it and its ability to maintain its markets and earn a reasonable return been placed beyond its control.

FURTHER, United shows and argues as follows:

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A. NOTHING CONTAINED IN THE NATURAL GAS ACT OR THE COMMISSION'S REGULATIONS REQUIRES UNITED TO OBTAIN PERMISSION FROM THE COMMISSION PRIOR TO DISCONTINUING RECEIPT OF GAS FROM CONTINENTAL IN THE JOHNSON BAYOU FIELD

(1) United Has Not Abandoned Any Facilities Or Any Service Which Is Prohibited By Section 7(b) Of The Natural Gas Act

The Commission's order speaks in terms of United showing cause why it should not obtain the Commission's approval before ceasing the "operation" of facilities

utilized to purchase Continental's Johnson Bayou Field gas. But changes in the "operation" of facilities is not encompassed in the action requiring prior Commission approval under Section 7(b) of the Act.

United has not abandoned service to any of its customers and it has not abandoned any of its facilities. Service to its customers has not been interrupted or discontinued as a consequence of curtailing receipts of the Johnson Bayou Field gas and United's facilities remain in place. Moreover, the Johnson Bayou Field reserves remain physically attached to United's transmission facilities and, unless Continental obtains authorization from the Commission to abandon its sale, those reserves remain available to United under Continental's unilateral, ex parte sales arrangement.

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Section 7(b) of the Act requires prior Commission approval for only abandonment of facilities or service and not for changes in the operation of facilities and United has not transgressed the prohibition contained in that section.

(2) Nothing Contained In The Natural Gas Act, The Commission's Regulations, Or Any Certificate Issued By The Commission Says United Must Purchase And Receive Any Specific Volumes Of Gas From Continental

There is nothing in the Act, the Commission's Regulations or any certificate issued by this Commission which even attempts to say that United must purchase specific volumes of gas from Continental.

United has hereto purchased Johnson Bayou Field gas when and as required by its contract with Continental, and the volumes of gas it transmitted through its facilities were

those required by the contract, not by the Natural Gas Act, the Commission's Regulations or any certificate issued by the Commission. Obviously, it cannot be contended that either the Act or the Regulations contain language which prescribes how much gas United must buy from the Johnson Bayou Field, or how it must operate its facilities used to purchase that gas, and since Continental has cancelled its contract with United, nothing exists anywhere which prescribes how much gas United must buy from the Johnson Bayou

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Field, and consequently how the facilities used to purchase the gas must be operated.

It is beyond question that the terms of the contract did not become a part of the service or "operation" of facilities undertaken by United in purchasing the Johnson Bayou Field gas. The Supreme Court of the United States has made this abundantly clear. In *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U. S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392, the decision turned on the distinction drawn between the service due the public and the contractual means by which it is implemented. The court said:

> "It [the Commission] has long drawn a distinction between the underlying service to the public a natural gas company performs and the specific manifestation—the contractual relationship—which that service takes at a given moment.
>
> * * * *
>
> "* * * the service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company * * *."

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Thus the Commission cannot say that the "operation" of facilities its order contemplates were those imposed on United by the contract Continental cancelled. That contract has been cancelled and United is free of the obligations it imposed.

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In addition United points out that the Act does not authorize issuance of certificates to "purchase" or "receive delivery" of natural gas. Indeed, most purchasers of natural gas (distributors and industries) are not subject to the Commission's jurisdiction and for those which are, including United, the Commission has never issued to them certificates to "purchase" or "receive delivery" of gas. For example, by Opinion No. 372 issued December 17, 1962, in Docket CI61-151, United was granted a certificate to sell and deliver 30,000 Mcf of gas a day to Mississippi River Fuel Corporation. Mississippi River Fuel Corporation had adequate capacity in existing facilities to transmit the gas and, properly, it neither sought nor obtained certificate authority to purchase or receive it. The reason the Commission has not issued certificates to purchase or receive delivery of gas is because Section 7 of the Act authorizes issuance of certificates for the operation, construction, extension, or acquisition of facilities and the sales and service rendered thereby. The Act's categorical listing of the areas where certificates are required and the significant omission of purchasing or receiving, permits no area for argument that certificates are required for either purchasing or receiving delivery of natural gas.

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Thus it cannot be said that United's cessation of purchasing and receipt of the Johnson Bayou Field gas violated any certificate the Commission could or should have issued United authorizing either act. United believes

that the Commission's use in its show cause order of the words "ceasing the opeartion" of facilities heretofore "operated" by United to purchase natural gas from Continental from the Johnson Bayou Field, confirms this view.

United is very aware of the continuing nature of the duty owed by it to the public it serves and it has not and does not propose in any way to avoid that duty. It has not abandoned its Johnson Bayou facilities and it has not abandoned or diminished service to any of its customers. Only this has occurred—Continental cancelled its contract and unilaterally imposed an ex parte sales arrangement and United has not bought any gas under that arrangement.

From the foregoing United would draw these conclusions:

First, not the Natural Gas Act, the Commission's Regulations or its certificates specify what gas United must purchase or receive from Continental at the Johnson Bayou Field, or when

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or how it must be purchased or received;

Second, since Continental cancelled the contract, it cannot be successfully argued that the terms of the contract have force to fix United's obligations to buy Johnson Bayou Field gas;

Third, absent the foregoing, United's management is free to discharge its public duties, including operation of its facilities used to purchase Johnson Bayou Field gas, as it thinks most efficient.

B. The Supreme Court Has Held That Under Ex Parte Sales Arrangements the Buyer Is Not Required To Purchase Any Gas

Several months prior to the expiration of the primary term of the contract under which Continental was selling

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gas produced in the Johnson Bayou Field to United, Continental undertook a course of action changing the sale from a bilateral, contractual relationship to a unilateral, ex parte relationship. To do this, Continental first served notice on United that it was cancelling the existing contract at the end of its primary term, despite the fact that the contract would have continued in effect had such action not been taken. Next, Continental sought a new contract with an increase in price from 10.79¢ per Mcf (including tax reimbursement) to 15.75¢ per Mcf (including

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tax reimbursement). United told Continental the higher price was not agreeable to it and urged Continental to apply for an abandonment, explaining that currently United was having to pay for large quantities of gas it could not take and that United could and would actively support the abandonment. United offered, pending action thereon, to continue purchasing, on a day to day basis, under the terms of the contract Continental had cancelled. Continental refused both. Determined to exact the higher price to which United had refused to agree, Continental unilaterally filed the 15.75¢ rate, and the Commission accepted it for filing (over United's protest) effective January 31, 1963.

Whatever Continental's right under the Natural Gas Act to cancel its contractual arrangement with United and unilaterally to establish an ex parte relationship, Continental has miscalculated the buyer's rights under such an ex parte relationship. The Supreme Court of the United States has said that under such an ex parte arrangement, the seller is obligated to continue to deliver gas on the buyer's request unless the seller can justify an abandonment before the Commission, and it has recognized that while the seller is obligated to supply gas, there is not a

corresponding obligation on the buyer to take it under such an ex parte arrangement.

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In rejecting United's protest of Continental's unilateral filing of the increased rate, the Commission cited the *Sunray* case (supra) as correctly reflecting the law, as follows:

> "It is apparent that the Commission's order in no way violates the integrity of petitioner's contract with United. During its term, both parties are bound by it to the same extent as any members of this regulated industry. When it expires, petitioner, to be sure, will be under an obligation to continue to deliver gas to United *on the latter's request* unless it can justify an abandonment before the Commission; but we do not see how this in any way disturbs the integrity of the contract during its term. The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the Act. It will be free then, as it was not free during the contract term under the contract here in question, to make rate changes under § 4 without United's consent. It is said that petitioner will be in a position of inequality, because it must supply gas then to United *without a* corresponding obligation on United to take it. But United, subject to the Act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under Mobile, it may be discovered that each side has its bargaining strength." (Emphasis ours)

If, as Continental believes, this language gives Continental the right unilaterally to prescribe the price and

terms of its sale, over the objection of United, then it is equally true that:

> Continental's obligation is " • • • to continue to deliver gas to United *on the later's request* unless it [Continental] can justify an abandonment before the Commission • • •." (Emphasis ours)

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The Supreme Court acknowledged as correct the argument advanced by *Sunray* that under the ex parte arrangement, which permits the seller to dictate the terms of the sale, the seller " • • • must supply gas then to United *without a corresponding obligation on United to take it.*" (Emphasis ours)

The court's recognition of the rights of the seller under an ex parte arrangement cannot be divorced from its recognition of the rights of the buyer under such an arrangement. If Continental is "free" to make changes "without United's consent" under its unilaterally established ex parte arrangement, that presupposes the right in United to purchase under the new arrangement only as its needs require. If *Sunray* gave Continental the right in the instant case to change the price of the Johnson Bayou Field gas "without United's consent" then United has the right to buy gas from the Johnson Bayou Field only as its needs require. The rights of a buyer under an ex parte or unilateral sales arrangement were ever so and were it not the case, the Supreme Court would not have held the seller free to change the price without the buyer's consent in the *Sunray* case.

Sunray created no new or preferential rights in the seller of natural gas to change rates under the Natural Gas Act. Those

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rights were clearly defined in *United Gas Pipe Line Company* v. *Mobile Gas Corporation*, 350 U.S. 332, 100 L. ed. 373, where the court said:

> "* * * The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: *to establish ex parte, and change at will, the rates offered to prospective customers*; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." (Emphasis ours)

United has certainly been a "particular customer" of Continental buying under terms fixed by contract, and United believes if it is yet bound to any performance by that contract that the terms thereof can only be changed by mutual agreement. But denying it is bound to any performance by the cancelled contract and, on the basis thereof, conceding Continental's right here to cancel its contractual relationship with United, there then remains for Continental only the alternative it would have possessed in the absence of the Act and made plain in *Mobile*. Having chosen unilaterally to establish an ex parte relationship, Continental can have no greater right than to "offer" its gas to United as a "prospective customer" and to change at will the rights "offered".

The Supreme Court's holding in *Mobile*, repeated and emphasized in *United Gas Pipe Line Company* v. *Memphis Light*,

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Gas & Water Division, 358 U.S. 103, 3 L. ed. 2d 153, 79 S. Ct. 194, that under an ex parte arrangement the seller offers gas to the buyer as a prospective customer, is con-

trolling here. As a seller without the limitations of a contract fixing its rates, Continental may enjoy the right to change its rate at will, but it can do no more than offer its gas to the buyer. If the buyer needs and accepts it, then it must pay the price fixed by the seller, but the seller cannot impose the terms and at the same time force the buyer to buy.

The holding in *Mobile* and *Memphis* is consistent with the holding in *Sunray*, and what the court said in *Sunray* cannot be accepted in part and rejected in part. The producer's right to raise its rates when freed from contractual prohibition from doing so, necessarily presupposes a change in the relationship between the buyer and the seller. The buyer can no longer be fettered by the restrictions imposed by the contract if the seller is free to ignore the restrictions imposed on it by the contract. The Supreme Court of the United States has said three times, in *Sunray, Mobile* and *Memphis* that the prospective buyer may buy gas as it needs it under rates unilaterally offered by the seller.

United's facilities remain intact and the Johnson Bayou Field gas remains attached to its system. All of United's customers

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are being adequately served and no service to them has been abandoned or diminished in any way as a result of United's not currently taking gas from the Johnson Bayou Field. No purpose would be served in speculating here on what United would have to do if it could no longer supply its customer requirements for that situation does not exist.

It seems clear to United that the foregoing is adequate "cause" why United cannot be required to secure the

Commission's approval before discontinuing receipt of Continental's Johnson Bayou Field gas. On the basis thereof the Commission should recall and vacate the show cause order issued herein and directed to United.

C. This Case Should Be Recognized for What It Is—an Attempt by Continental To Force United To Buy on Continental's Terms

This matter should be placed in its proper prospective. Through its petition and its brief addressed to the Commission seeking issuance of a show cause order, Continental casted itself in the role of one inflexibly compelled by the Natural Gas Act, without regard to its own wishes, to sell its Johnson Bayou Field gas to United. But such is not at all the case. Continental does not desire in the least to be free of its market of the Johnson Bayou Field gas to United. On the contrary, it views the market

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jealously and believes it sees in the situation an opportunity to retain all the benefits of its contract with United while exacting from United, against its will, the highest rate the Federal Power Commission will allow.

Continental has known all the while that United was not agreeable to paying the higher price demanded by Continental for the Johnson Bayou Field gas and that United did not currently need the Johnson Bayou Field gas and was not willing to take it at Continental's unilaterally increased rate.

Continental, of course, never doubted for a moment its right to apply to this Commission for authority to abandon its sale to United, but it chose not to do so because it thought it had discovered a situation in which the pipe-

line buyer was deprived of its bargaining strength. The real issue presented in this case is can Continental, which cancelled an existing contract, refused to apply for an abondonment, rejected United's offered contract, and unilaterally raised its price from 10.797¢ per Mcf to 15.75¢ per Mcf over United's objection, now force United to purchase gas United does not currently need, in quantities satisfactory to Continental, under terms and at a price unilaterally imposed by Continental.

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There is no question of the public interest involved here. United's customers have not and will not be deprived by United of natural gas service as long as United can purchase gas and sell it at reasonably compensatory rates. There is no question here of abondonment of facilities or abandonment of service to the public. United is acutely conscious of its obligations to the public and it is also conscious of the court's admonition in the *Sunray* case where it said:

> "• • • but United, subject to the act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under Mobile, it may be discovered that each side has its bargaining strength."

United presumes the court's statement is correct and that both Continental and United retain bargaining strength. But United would have no bargaining strength if Continental can lawfully cancel its contract, unilaterally establish new price and terms, and then force United to buy at the unilaterally established price and terms. The Commission should not, through the guise of regulation under the Natural Gas Act, afford Continental greater rights and bargaining strength than those recognized in *Sunray, Mobile* and *Memphis*. In fulfilling its obligations to local

distributors United does desire to have a continuing supply of gas with the

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stability of price protection which a contract furnishes under *Mobile,* and it is convinced that the one sure way to lose that objective is for the Commission to here tell Continental that United *must* buy a producer's gas, after expiration of the contract term, at the price and on the conditions the producer chooses unilaterally to establish.

The Commission should not equate Continental's interest with the public's interest. The Supreme Court has repeatedly declared that the Natural Gas Act was enacted to protect "consumers"—it was not enacted to accord one natural gas company an advantage over another natural gas company it did not possess without the Act. United reminds the Commission of what must be obvious, the obligation Continental would here impose on United is not the same as United undertook when it built the facilities necessary to purchase Johnson Bayou Field gas and began the purchase of that gas. Continental has sought to change the obligation to its advantage and to United's detriment, and then insist that continuity of service in the public interest permits it to make the change and requires United to accept the more onerous obligation. It would be difficult to imagine a more inequitable argument.

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The Supreme Court of the United States has thrice said that if a seller avails itself of an ex parte sales arrangement in preference to a contractual arrangement, the seller merely offers its gas for sale and that the buyer may buy it as its needs require. United has taken no action inconsistent with those three rulings and certainly the Commission cannot and will not lend assistance to Continental's deliberate effort to avoid them.

D. If Continuity of Operation Consistent With the Contract Is Required by the Natural Gas Act, Then That Continuity Is Required Equally of Continental and United

The Commission's show cause order recites that the Commission is here inquiring whether the Natural Gas Act and the Commission's Rules and Regulations thereunder require United to apply for and obtain the Commission's permission and approval before ceasing the operation of all or any portion of the facilities heretofore utilized to purchase from Continental natural gas produced in the Johnson Bayou Field and whether the termination by United of its purchases of gas from Continental constitutes in whole or in part an abandonment of service.

The short answer to this inquiry is that United has not expressed an unwillingness to continue operating those facilities and performing the same service it undertook initially to perform.

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United has done nothing more than exercise its right as a prospective purchaser not to buy Continental's gas under the ex parte sales arrangement imposed by Continental. If the Commission is unwilling to accept this as an adequate answer to its show cause order and feels it must order United to currently take the volumes of gas required by the contract, then United says the Commission must first clear the way for United to again render service under the contract. It must reject Continental's unilateral rate filing and recognize the contract as binding.

If United does not have the right to purchase or refrain from purchasing under Continental's unilateral imposed ex parte arrangement, then United says Continental did not have the right lawfully to file with this Commission an increased rate applicable to this sale. Consistent with

that position and only in the event the Commission holds that United must purchase the Johnson Bayou Field gas, United shows and argues as follows:

The contract dated January 22, 1953, between Continental and United covering the sale and purchase of Johnson Bayou Field gas contained specific terms, including "price" and "take" provisions mutually agreed upon by the parties. The contract granted neither party the right unilaterally to change any of

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the terms contained therein, including the price. As between United and Continental, United owed Continental no obligations other than those contained in the contract of January 22, 1953, and the Commission erred when it purported to allow Continental to change those obligations over United's objection, if it intended to compel United to take gas, against its will, under such changed obligations.

If uninterrupted sale and purchase of Johnson Bayou Field gas is required of Continental and United by the public interest, then the Commission should have rejected Continental's unilateral effort to change the obligations of United. If continuity of service requires United today to take from the Johnson Bayou Field the volumes of gas required by contract, but to pay a higher price than fixed in the contract, it is obvious that the contract has been preserved in part and discarded in part, all to Continental's advantage and to United's disadvantage. Absent the contract provisions, what volumes of gas must United today take from the Johnson Bayou Field? If the contract has been cancelled, nothing exists anywhere specifying United must purchase any specific volumes of gas from Continental. Can the Commission now say that continuity of service permits it, as between the contracting parties, to look to some terms of the contract to determine the duties of

one party and ignore the contract in determining the duties of the other party. Certainly not.

It is no answer to say to United that it may apply to the Commission for authority to decrease these volumes or abandon the purchase altogether for, obviously, if United must ask permission, that permission could be denied.

Continental's action in cancelling the contract of January 22, 1953, was necessarily ineffectual and the Commission's action in accepting Continental's unilateral filing of an increased rate was unlawful if United is yet bound to any "performance" under the contract. If so bound, United was entirely justified in discontinuing receipts of the Johnson Bayou Field gas pending the Commission's correction of its unlawful action.

E. If the Natural Gas Act or the Commission's Regulations Contain Provisions Requiring United to Purchase Gas At Terms Unilaterally Imposed Then They Are to That Extent Unconstitutional

It must be clear that neither the Natural Gas Act nor the Commission's Regulations contain provisions which require a buyer to purchase gas on terms and conditions unilaterally imposed by the seller under an ex parte arrangement. The Supreme Court of the United States has said so in *Sunray* and *Mobile* and *Memphis,* but if the Act and the Regulations do contain such provisions, then they are to that extent unconstitutional.

In support thereof, United shows and argues.

It cannot be said that the higher rate for Johnson Bayou Field gas is the work of the Commission. It was Continental, not the Commission, that conceived of and

filed the higher rate. The Commission's acceptance for filing of the higher rate does not alter the fact that it was unilaterally filed, nor does it mean that the Commission has determined that the rate is "just and reasonable". In particular, it does not mean that the Commission has in any way considered the needs of United with respect thereto.

Most of United's many customers are local distributors and private industries who are free to buy from United, or refrain from doing so, as their contractual arrangements with United permit. Much of United's sales are made in direct competition with fuel oil, coal and other sources of natural gas.

United is acutely aware of its obligations to serve its customers and it is vitally concerned with maintaining its markets and making a reasonable return. Nothing contained in the Natural Gas Act guarantees United any market or any return. United must strive to keep its markets, looking always to its costs and its competition, and it can earn a return only if it maintains

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its markets and serves them economically. If the Natural Gas Act contains provisions which permit Continental or the Commission unilaterally to fix the quantities of gas United must buy and the rates it must pay, all without consideration of the needs of United and over its objection, then United's properties have been taken from it and its ability to maintain its markets and earn a reasonable return have been placed beyond its control. Obviously regulation unilaterally imposed, without consideration of the needs of the company regulated, is not consistent with the requirements of due process.

United has no exclusive service area. It operates in gas producing states where competition from other suppliers

of natural gas is no remote possibility, but is real and highly effective. Untold numbers of producers in Texas and Louisiana are willing and anxious to dispose of their natural gas reserves in intrastate sales in order to avoid the burdensome effect of federal regulation. Producers' rates are not regulated by these states and certificates are not required or issued to producers or transmission companies. The net result to United of this competition has been the loss of many substantial markets, and the prospect exists that the competition will become more severe.

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United does not object to competition for it believes it can control its costs through contractual arrangements and maintain them at a level low enough to permit it to compete. But United will be unable to compete if either Continental or the Commission can tell United that it must purchase gas in quantities it does not currently need and pay therefor a higher rate than United is willing to agree to. Continental's unilateral rate increase and the Commission's acceptance thereof did not take this competitive situation into account and did not purport to do so. The action was taken unilaterally and independently of United and without any consideration of United's needs. If the Natural Gas Act contains provisions which permit Continental or the Commission to require that United purchase particular quantities of gas from Continental, without regard to United's needs, and permits Continental to establish what must be paid for that gas, all over the objection and without the agreement of United, then United's ability to maintain its markets and earn a reasonable return have been effectively placed beyond its control. Any such orders will cause United's properties and facilities to be taken and used without its consent. Obviously Continental does

not guarantee United the adequate compensation required by the due process provisions of the Constitution

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for such appropriation of United's properties, and neither does the Natural Gas Act.

F. Finally United Says If the Commission Does Require United to Take Continental's Gas the Commission Must Establish All Terms of the Sale and Purchase

Continental has cancelled the contract relating to this sale. If, despite that fact and the foregoing arguments, the Commission concludes that it can force United to purchase Continental's gas, then on what terms and conditions is United required to buy? It would be the rankest injustice and patently unlawful for the Commission to say that an obligation imposed by the Act requires United to purchase this gas but that Continental has the right unilaterally to establish the terms and conditions thereof. And it would not be factual for the Commission to say that United agreed by contract to terms and conditions acceptable to the Commission, for United contractually agreed to a single set of terms and conditions, which included a lesser price than that now filed. If the Commission is to order United to purchase Continental's gas, that order must do more than simply say BUY. If United is to comply, the order must be made comprehensible and possible of execution by the Commission's specification of the terms and conditions on which United must perform. At this time the

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Commission has not sought to provide those terms and conditions and, in the absence thereof, United feels it is clearly correct in not currently buying Continental's gas. This in itself should be an adequate answer to the Commission's show cause order.

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If United is to be forced to take Johnson Bayou Field gas, then it asks these questions:

(a) What price must United pay?

(b) What volumes must United take?

(c) What maximum volume may United take in any day?

(d) What delivery capacity must Continental maintain?

(e) At what pressure must Continental deliver?

(f) What quality specifications must Continental meet?

(g) Can Continental be required to dehydrate the gas?

(h) Can Continental be required to compress the gas?

(i) On what basis will the gas be measured?

(j) What development must Continental accomplish?

(k) Can Continental process the gas to remove hydrocarbons?

(l) Under what conditions will Continental or United be relieved temporarily of their obligations?

If the Commission's role here lends lawfulness to the duress to be applied to United, to force it to purchase Continental's

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gas, then the Commission must necessarily have the power, and exercise it, to prescribe answers to each of the above questions. United submits the Commission has no such power under the Natural Gas Act, and it is sure that the mere retention of a cancelled contract on file with the Commission setting forth some of the answers to the foregoing questions does not represent any exercise of power by the Commission to prescribe such terms and conditions.

WHEREFORE, United prays that the above and foregoing answer in the nature of a brief be deemed good and sufficient and that the Commission withdraw and vacate the show cause order issued May 1, 1963, and directed to United Gas Pipe Line Company.

UNITED GAS PIPE LINE COMPANY

By VERNON W. WOODS
Vernon W. Woods
Attorney

Counsel for
United Gas Pipe Line Company:

WILBERT O. CRAIN
SAUNDERS GREGG
DAVID KLOTZ
1525 Fairfield Avenue
Shreveport, Louisiana

VERNON W. WOODS
WILLIS L. MEADOWS
P. O. Box 1707
Shreveport, Louisiana

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STATE OF LOUISIANA
PARISH OF CADDO

Personally came and appeared before me the undersigned, duly qualified and acting Notary Public, VERNON W. WOODS, who being by me, Notary, first duly sworn, deposes and says:

That he is attorney for United Gas Pipe Line Company and authorized to make this affidavit, that he has read the foregoing answer in the nature of a brief and that the

matters of fact contained therein are true and correct to the best of his knowledge, information and belief.

VERNON W. WOODS
Vernon W. Woods

SWORN TO AND SUBSCRIBED before me on this the 17th day of May, 1963.

PIKE HALL, JR.
Notary Public in and for
Caddo Parish, Louisiana

(SEAL)

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Exhibit "A"

CONTINENTAL OIL COMPANY
P. O. Box 2197
Houston 1, Texas
October 23, 1962

REGISTERED MAIL
RETURN RECEIPT REQUESTED

United Gas Pipe Line Company
P. O. Box 1407
Shreveport, Louisiana

Attention of Mr. T. L. Aubin, Jr.

Re: Johnson's Bayou Field,
Cameron Parish, Louisiana

Gentlemen:

This is with reference to the Gas Purchase Contract, dated January 22, 1953, by and between United Gas Pipe Line Company and Continental Oil Company, which provides for the sale and purchase of gas from Continental's interests in the Johnson's Bayou Field, Cameron Parish, Louisiana.

According to Article XIII of said Contract, the primary term thereof shall be for a period of ten (10) years from the date of commencement of deliveries, such date being January 31, 1953, and thereafter for successive periods of one year each; provided, however, that either party may terminate the Contract at the end of the primary term or any succeeding annual period by giving to the other party at least ninety (90) days prior written notice of the intention of the party giving such notice to terminate the Contract.

Continental Oil Company hereby gives notice to United that it elects to terminate said Contract as of the thirty-first day of January, 1963.

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Please acknowledge receipt of this notice by having one (1) copy signed on behalf of United Gas and returning it to this office.

Yours very truly,

CONTINENTAL OIL COMPANY

BY /s/ O. L. FISHER
Vice President

Acknowledged this 7th
day of Nov., 1962.

UNITED GAS PIPE LINE COMPANY

BY /s/ C. C. BARNETT
Vice President

Exhibit "B"

UNITED GAS PIPE LINE COMPANY
Shreveport, Louisiana
December 17, 1962

Continental Oil Company
P. O. Box 2197
Houston 1, Texas

Attention: Mr. C. E. Lamb

Gentlemen:

This letter is with reference to the Gas Purchase Contract of January 22, 1953, as amended, between Continental Oil Company and United Gas Pipe Line Company covering the sale and purchase of gas in the Johnson Bayou field, Cameron Parish, Louisiana. This contract provides for a primary term extending to January 31, 1963, and for successive secondary terms of one (1) year each; subject to cancellation by either Continental or United at the end of the primary term or any succeeding annual period upon ninety (90) days prior written notice to the other party.

Continental, by letter of October 23, 1962, canceled this contract effective as of January 31, 1963. On November 21, 1962, you contacted United requesting that we agree to enter into a new twenty (20) year contract with you in the Johnson Bayou Field commencing at a price of 14¢ per Mcf plus 1.75¢ per Mcf tax reimbursement.

As we discussed with you during our meeting of December 13, 1962, we have reviewed your recent contract proposal, and we wish to advise that at this time we have no need for this gas because the gas supply now under contract to United is adequate to supply our present market requirements. Because of this condition, we also wish

to advise that we intend to support your filing with the Federal Power Commission for abandonment of service.

Very truly yours,

s/ T. L. Aubin, Jr.
T. L. Aubin, Jr.

TLA:lj

Exhibit "C"

UNITED GAS PIPE LINE COMPANY
Shreveport, Louisiana
December 20, 1962

Continental Oil Company
P. O. Box 2197
Houston 1, Texas

Attention: Mr. C. E. Lamb

Re: United Gas Pipe Line Company's Gas Purchase Contract No. 1551 Johnson Bayou Field Cameron Parish, Louisiana

Gentlemen:

This is with reference to our letter to you of December 17, 1962, with respect to Continental's election to cancel the captioned contract on January 31, 1963, and United's advice therein that it intends to support Continental's filing with the Federal Power Commission for abandonment of service.

This will confirm United's prior verbal advice to you in our meeting of December 13, 1962, that United is willing to continue to receive such gas subsequent to the expiration date of the captioned contract in accordance with the terms and provisions of such contract for the benefit of Continental until Continental obtains authority from the

Federal Power Commission to abandon service to United. Accordingly, if Continental desires to continue delivering gas to United from the Johnson Bayou Field on a day-to-day basis from and after January 31, 1963, United is willing to continue to receive such gas in accordance with the terms and provisions of the captioned contract, including the price and tax reimbursement provisions set forth therein.

Very truly yours,

s/ T. L. Aubin, Jr.
T. L. Aubin, Jr.

Registered Mail
Return Receipt Requested

Exhibit "D"

UNITED GAS PIPE LINE COMPANY
Shreveport, Louisiana

December 26, 1962

Continental Oil Company
P. O. Box 2197
Houston 1, Texas

Re: United Gas Pipe Line Company's Gas Purchase Contract No. 1551 Johnson Bayou Field Cameron Parish, Louisiana

Gentlemen:

Please refer to our letter to you of December 20, 1962, wherein we advised that if you desire to continue delivering gas to us from the Johnson Bayou Field on a day-to-day basis from and after January 31, 1963, we are willing to continue to receive such gas in accordance with the terms and provisions of the captioned contract, including the price and tax reimbursement provisions set forth therein.

This letter will evidence the agreement between Continental Oil Company (Continental) and United Gas Pipe Line Company (United) that, from and after January 31, 1963, Continental agrees to sell and deliver to United and United agrees to purchase and receive from Continental, on a day-to-day basis, under and in accordance with the terms and provisions of the captioned contract, including the price and tax reimbursement provisions set forth therein, the gas produced from the lands and leaseholds covered by said contract; it being understood that upon one (1) day's notice, either Continental or United can terminate this agreement.

If the foregoing correctly sets forth your understanding with regard to the matter set forth herein, please indicate your acceptance on the duplicate originals hereof in the space provided below, and return one of the originals to us for our files, thus constituting this letter an agreement between the parties hereto.

Very truly yours,

UNITED GAS PIPE LINE COMPANY
s/ C. C. BARNETT
Vice President

Accepted and Agreed to:

CONTINENTAL OIL COMPANY

By _____
Vice President

Exhibit "E"

CONTINENTAL OIL COMPANY
P. O. Box 2197
Houston, Texas

December 28, 1962

United Gas Pipe Line Company
P. O. Box 1407
Shreveport, Louisiana

Attention of Mr. T. L. Aubin

Gentlemen:

We wish to acknowledge receipt of your letter of December 26, 1962, and the attached letter agreement pertaining to the gas purchase and sale agreement covering our interest in Johnson Bayou Field, Cameron Parish, Louisiana.

As you were previously advised, we have elected to file for a rate increase for gas delivered to United from this field. Copies of our filing have been furnished United under separate cover.

Yours very truly,

s/ C. E. LAMB
C. E. Lamb
Regional Coordinator of
Natural Gas Activities
Southern Region

CEL-IC

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CERTIFICATE OF SERVICE

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Designation of Presiding Examiner

(filed May 24, 1963)

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[Docketed May 3, 1963]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Docket No. CI63-979

CONTINENTAL OIL COMPANY

Order Permitting Intervention

(Issued May 31, 1963)

Texas Eastern Transmission Corporation, P. O. Box 2521, Houston 1, Texas, filed a petition to intervene in this proceeding, alleging in support thereof that it owns and operates a natural gas transmission system extending from Texas, Louisiana and Mississippi to the Newark—New York area and that it purchases substantial quantities of natural gas from United Gas Pipe Line Company, which has been ordered to show cause in this proceeding.

The Commission finds:

It is desirable to allow the petitioner to intervene in this proceeding in order that it may establish the facts and law from which the nature and validity of its alleged rights and interests may be determined and show what further

action may be appropriate under the circumstances in the administration of the Natural Gas Act.

The Commission orders:

The petitioner is permitted to intervene in this proceeding subject to the rules and regulations of the Commission: *Provided, however,* that its participation shall be limited to matters affecting asserted rights and interests specifically set forth in the petition to intervene; and *Provided, further,* that permission to intervene shall not be construed as recognition by the Commission that it might be aggrieved by any order entered in this proceeding.

By the Commission.

J. H. GUTRIDE,
Secretary

(SEAL) DC 32

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[Docketed June 3, 1963]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. CI63-979

In the Matter of:

CONTINENTAL OIL COMPANY

Reply of Continental Oil Company to Answer of United Gas Pipe Line Company to Order to Show Cause

Comes Continental Oil Company and submits this Reply to the Answer of United Gas Pipe Line Company to Order to Show Cause. Continental's Reply shall be confined to the specific points presented by United. For reply to United's answer, Continental respectfully shows as follows:

STATEMENT OF FACTS

While the principal relevant facts appear to be undisputed, Continental submits that certain allegations are unfounded, and other additional relevant facts are not set out.

I.

Continental does not agree that United did not or does not need the Johnson Bayou gas supply (United's Answer, p. 3). More particularly, Continental submits that United, its customers and the consuming public relying upon United's system do need this committed gas reserve, which contains more than 6,000,000 Mcf remaining

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recoverable reserves underlying Continental's lease as of February 1, 1963.

2.

United states that Continental's unilateral rate increase was made effective over United's formal protest (United's Answer, p. 4). However, United did more than protest; United filed on February 21, 1963 an application for rehearing of the Commission's letter order of January 25, 1963 accepting Continental's unilateral rate filing and permitting the same to become effective on January 31, 1963 without suspension. This application for rehearing was denied by the Commission on March 18, 1963. Significantly, United, having instituted review of the Commission's order by applying for rehearing, did not follow through when the Commission denied rehearing. No petition for review was timely prosecuted to the Courts of Appeals. The Commission order making effective Continental's unilateral rate became a final non-reviewable order on May 17, 1963.

3.

The assertion that United is confronted with take-or-pay obligations under contracts with other producers (United's Answer, p. 5) is neither material, relevant nor well-founded. Even if take-or-pay deficiencies exist under some of United's contracts with other producers, such deficiencies are not an excuse to United

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ceasing takes from Continental without having obtained Commission approval and permission for abandonment pursuant to Section 7(b) of the Natural Gas Act. If such were an excuse, then United could as well claim the same excuse to each and every of those other producers, telling each in turn the same story. These take-or-pay contracts were made knowing that obligations would have to be met with *all* of the producers connected to United's system, not just a few with specific take-or-pay contractual rights. The statutory obligations to continue operation of jurisdictional facilities and services rendered by such facilities cannot be abrogated by mere contractual arrangements with individual producers.

United cannot expect that gas supply and demand will balance perfectly at all times. Periodic curtailments of takes under contracts which may contain minimal take-or-pay requirements is always an appropriate means of resolving temporary over-supply situations which may arise under contractual commitments. This does not necessitate or permit total cessation of takes from any producer, with the ensuing abandonment of facilities and service, and the attendant jeopardy of the shut-in producer's leases. Moreover, there is no showing or allegation that United has made or will make any payments for gas not taken from other producers which United cannot later make up by subsequent takes. Indeed, Continental

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believes that United's dire picture of take-or-pay requirements is dramatically exaggerated. If United has made any payments for gas not taken, such payments are not the burden United would suggest and may be made up by United.

Further, Continental submits that United has admitted a willingness to take Continental's Johnson Bayou gas, without raising any excuse of take-or-pay commitments to other producers—if Continental would only not change the 8.99¢ price under the terminated 1953 contract. The obvious truth is that United isn't complaining about too much gas from Johnson Bayou—but only complaining about the 14¢ price which the Commission has permitted to become effective.

Finally, Continental would show that United has continued to contract for new reserves of gas at prices at least as high as 18¢ under new contracts made during the very period when United was refusing to enter into a new contract with Continental at 14¢ and even after United altogether ceased taking the Johnson Bayou gas. These new contracts certainly do not show that United is up to its ears in gas or that take-or-pay commitments have such a deleterious effect as United would picture.

Continental submits that United's allegations concerning take-or-pay requirements with other producers are immaterial, irrelevant and unfounded, for the foregoing reasons, and should be disregarded.

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4.

Despite assertions that gas delivered by United into the Beaumont area is sold by United to customers not subject to Commission jurisdiction, that United has no exclusive

service area assigned by the Commission, and that the Commission has no control over United's intrastate competitors (United's Answer, pp. 6-7), the sale and purchase from Continental to United and subsequent transportation of gas from Johnson Bayou by United in its *interstate* system are incidents in interstate commerce subject to the Commission's jurisdiction. *United* is subject to the Commission's jurisdiction.

The Johnson Bayou gas is gas moving in and dedicated to interstate commerce, and gas which is available to United over its entire system, not just the Beaumont area.

As to competition and non-exclusiveness of market service areas which would plague United, suffice it to say that Continental also is faced with even keener competition for markets with other producers, and Continental has no exclusive service area either.

5.

United contends that it may be compelled to purchase gas from other producers under unilateral rates upon expiration of other contracts (United's Answer, p. 7). However, all unilateral rates are subject to Commission

scrutiny, and the Commission may suspend and upon hearing disallow any rate which United might allege to be unjust, unreasonable or unduly discriminatory. Any rate increase must be tested and proved in the public interest. Can United dare ask for more protection against unreasonable rate increases than this protection of the Commission?

ARGUMENT

6.

United asserts that it has not abandoned any facilities or service (United's Answer, pp. 8-9). This point has pre-

viously been met in Continental's Petition for Order to Show Cause and supporting brief. A few comments may be added.

United glibly speaks of "changes" in operation of facilities, switching from the Commission's show-cause order directed to United's "ceasing" such operation. Similarly United speaks of "curtailing receipts of the Johnson Bayou gas," when the plain truth is United simply quit taking this gas altogether. This subtle shifting of words cannot evade the true effect of United's actions. Cessation of takes in Johnson Bayou Field is an abandonment of *this* sale, *this* service and *these* facilities. Letting the facilities rust away in indefinite idleness and subjecting the reserves themselves to lease forfeiture is an abandonment of facilities and service. The reserves

will not indefinitely remain available to United if Continental's lease forfeits for lack of production, if the gas is drained away by other producers, or if the wells crater for being shut in over prolonged time.

7.

Next United asserts that the Act and Regulations do not say that United must purchase any specific volume of gas from Continental (United's Answer, pp. 9-13). This point too has been met in Continental's briefs. All that is required here is that United *take gas ratably* from Continental along with other producers. Pro-rata takes will permit United to operate its overall system without interference by the Commission in the minutiae of daily takes from each field. United has been taking gas *ratably* from Johnson Bayou Field for ten years. It knows how to continue to do so without being spoon-fed a daily field quota by the Commission.

Although contractual rights and obligations are terminated, United and Continental are still faced with the facilities and service previously covered by contract and which once begun must be continued for the benefit of the public.

Although the Act does not authorize issuance of certificates to "purchase" gas, a certificate to sell is not issued without there being a purchaser to buy the gas. So, if the certificate to sell gas must outlive the term

of the contract to sell, as the *Sunray* case, 346 U.S. 137, holds, then also must the purchaser, and his obligation to purchase the gas, outlive the term of the contract to buy. It is the Natural Gas Act, as construed by the Supreme Court in *Sunray*, which controls over United's continuing purchase of Johnson Bayou gas upon contract termination, not the whim of United's management.

8.

Again United asserts that there is no requirement that the buyer purchase gas *ex parte* (United's Answer, pp. 13-19). Continental's earlier briefs have also dealt with this specious argument. The references by United out of context to language in *Sunray* that the producer must sell gas to the pipeline "on the latter's request" and "without a corresponding obligation on United to take it" have already been explained for what they are. The Court in *Sunray* simply was not confronted with a willing seller and an unwilling buyer, but rather the opposite. Hence the Supreme Court in that case, just as in the *Mobile* and *Memphis* cases also referred to by United, 350 U.S. 332 and 358 U.S. 103, did not comment upon the obligations of an unwilling buyer, such as United in this case.

9.

Next, United alleges that this case is nothing but an attempt by Continental to force United to buy on Continental's terms. This kind of claim meets itself

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coming, since Continental could just as well say that United's refusal to make a new contract at any price higher than the old contract price of 8.99¢ coupled with United's willful refusal to take gas at Continental's lawful effective unilateral price is an attempt by United to force Continental to sell on United's terms.

Indeed, let us recognize this case for what it is—not the case of two small children saying "I won't play your game if you won't play it my way," as suggested by United's diatribe, but rather an attempt by Continental to achieve equality under regulation for producers and pipelines alike. United again says that it does not need the Johnson Bayou gas (United's Answer, pp. 20-26). Yet why did United contract to buy the gas in the first place, and take the total gas supply available from Continental through the life of the field, estimated at still another 16 years, into its total system reserves reported to the Commission and claimed in United's own certificate proceedings? And why has United since gone out and bought other gas under newly executed contracts since termination of the Johnson Bayou contract?

10.

Perhaps feeling the closing of the ring, United begins to concede that continuity of operation just may be required after all, but argues that if continuity of operation *consistent with the contract* is required by the

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Natural Gas Act, then that continuity is required equally of Continental and United (United's Answer, pp. 23-26). All well and fine—starting with a false premise, the conclusion is quite appealing. But no one has said anything about continuity of operation "consistent with the contract" except United. Continental says that United must continue to take and purchase the Johnson Bayou gas consistent with and in accordance with Continental's lawful effect rate schedule, including the unilaterally filed and Commission accepted rate thereunder.

United still will not let go of the contractual concept, and admit that the rate schedule overrides the purely private contractual arrangements, or lack thereof, between producer and pipeline.

The contract does indeed provide the basis for the rate schedule, *until lawfully changed in accordance with the Natural Gas Act.* But the *Sunray* case has made clear the overriding nature of the certificate and rate schedule which are not dependent upon continuation of the contract. Even while the contract may remain in force, certain contractual provisions may be abrogated by regulation of the Commission. During the initial term of the contract, the agreed-upon price set by the parties may be changed by a certificate condition or by a finding under the rate provisions of Section 4 or 5 of the Act.

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Although provisions of the contract may also become effective provisions of the rate schedule, changes may lawfully be made in the superseding rate schedule which do not accord with or find basis in the contract. Just such a change is the unilateral rate change in this case.

United would now seek to escape the effect of this change in Continental's rate schedule by trying to relate the sale

and purchase of gas under the unilateral rate filing with a sale and purchase under the terminated contract. There is just no merit to the argument that depends on this *non-sequitur*. So the assertion at pages 24-25 of United's Answer that the *contract* did not permit an *ex parte* unilateral rate filing is just utter nonsense. If the *ex parte* unilateral filing had been made under the contract, it would not have been a unilateral filing at all, but a contractual filing. The filing was made without either basis for or restriction against in contract, but solely under Section 4 of the Natural Gas Act, as construed by the Supreme Court in *Sunray*.

Insofar as the unilateral rate filing by Continental did not change the rate schedule (derived as it may have been from a contract) then the rate schedule is still effective according to its original terms. So the rate schedule may still provide for ratable take. However, in this case the Commission could as well derive

a ratable take requirement from the controlling Louisiana state ratable take statute, or principles of equity, both discussed in Continental's earlier briefs.

11.

The penultimate point urged by United asserts the unconstitutionality of the Natural Gas Act (United's Answer, pp. 26-30). This argument presents what is properly an appeal directed to Congress for repeal of the regulatory scheme of the Act. Essentially United's position would carry with it a return to free competition where private parties may contract at will and live controlled only by their contracts. However, the Natural Gas Act, with the controlling judicial decisions construing it, represents a comprehensive regulatory scheme in which contracts are not the ultimate measure of rights and obligations, but

only the starting point. This Congress alone can change now. Such change Continental would welcome with United, but until Congress should act, Continental must live within the limits of lawful regulation.

If producers were not subject to regulation, Continental would never have filed a petition for an order to show cause in these proceedings. But Continental has no other recourse than to seek such an order to prevent the inequity which would follow if Continental were required to sell gas which United had no obligation to buy.

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12.

At last, United submits that the Commission must establish all terms of the sale and purchase if United is required to take Continental's gas (United's Answer, pp. 30-32). This too has been covered before in Continental's previous briefs, and is also answered in the foregoing discussion relating to the effect of Continental's rate schedule, in section 10 of this Reply. The provisions of Continental's rate schedule covering the Johnson Bayou sale may well be considered in the nature of a tariff, and may supply the answers to the questions posed by United respecting specific terms and conditions of the sale and purchase which might otherwise be prescribed by contract. However, Continental submits the Commission need not answer all these questions at this time, but simply need order United to continue takes *in accordance* with Continental's lawful rate schedule.

This is not the first case involving a pipeline's obligation to continue to take gas under a unilateral rate schedule and at an *ex parte* rate filed by the producer after termination of the contract. Mobil Oil Company has been selling gas produced from the South Oklahoma City Field in Oklahoma to Cities Service Gas Company under Mobil's Rate

Schedule 34 and certificate issued at Docket G-14118 for the last two years at a unilaterally increased non-contractual rate of 20¢ per

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Mcf. This rate was filed by Mobil upon termination of the contract with Cities Service and represents an increase from the previous contractual rate of 20¢ per Mcf. Apparently Cities Service had no question about the obligation of a pipeline to continue purchasing in such a situation in accordance with the producer's unilateral rate schedule. This instance is adequate precedent for the proposition that the rate schedule, which survives termination of the contract, still continues in force to provide all of the necessary terms and provisions covering the sale and purchase of gas. Those provisions of the rate schedule which have not been changed are still in effect, the same as they would have been before termination of the contract. Any lawfully changed provisions of the rate schedule, such as the unilaterally filed change in price, are effective in lieu of the previous contractual provisions.

WHEREFORE, Continental urges the Commission to direct and order United to continue taking gas in accordance with Continental's Rate Schedule 115, as prayed in Continental's Petition for Order to Show Cause in these proceedings.

Respectfully submitted,

TOM BURTON
Tom Burton
BRUCE R. MERRILL
Attorneys for
CONTINENTAL OIL COMPANY

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CERTIFICATE OF SERVICE

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AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Tom Burton, who, being by me duly sworn, on oath deposes and says: That he is an attorney for Continental Oil Company; that he has prepared and read the foregoing Reply, and that the facts stated therein are true to the best of his knowledge, information and belief.

TOM BURTON
Tom Burton

Sworn to and subscribed before me, this 1st day of June, 1963.

HALLIE R. MADELEY
Notary Public in and for
Harris County, Texas

(SEAL)

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CONTINENTAL OIL COMPANY Docket No. CI63-979

Presiding Examiner's Initial Decision Upon Order to Show Cause

(Issued October 28, 1963)

APPEARANCES

For Continental Oil Company

Tom Burton
Bruce R. Merrill

For United Gas Pipe Line Company

Vernon W. Woods
W. O. Crain
Saunders Gregg
David Klotz
Willis L. Meadows

For Texas Eastern Transmission Corporation

Jack D. Head
Keith M. Pyburn
Joseph F. Weiler

For the Staff of the Federal Power Commission

C. Louis Knight

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KURZ, *Presiding Examiner:* This proceeding involves an order directed to United Gas Pipe Line Company (United) to show cause as to whether it should first be required to obtain permission and approval for abandonment under Section 7 (b) of the Natural Gas Act[1] before discontinuing a purchase of Johnson Bayou Field gas from Continental Oil Company (Continental). In issuing this order, the Commission found:

> "We find it necessary and appropriate in carrying out the provisions of the Natural Gas Act, therefore, that United show cause, as hereinafter ordered, why

[1] Section 7 (b) provides: "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

it should not file with the Commission an application for abandonment authorization pursuant to Section 7(b) of the Natural Gas Act and the Commission's Rules and Regulations thereunder."[2]

"United Gas Pipeline Company shall appear and show cause, if any there be, at the hearing directed in paragraph (B) hereof, why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental Oil Company from Johnson Bayou field, Cameron Parish, Louisiana."

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The Commission Staff and Continental take the position that the discontinuance by United of the purchase of Continental's gas from the Johnson Bayou Field constitutes an abandonment under Section 7 (b) of the Natural Gas Act. United and Texas Eastern Transmission Corporation (Texas Eastern), an intervenor, take the position that an abandonment under this section has not occurred and that United is not required to purchase gas under terms and conditions imposed unilaterally by Continental.

Both United and Continental are natural-gas companies subject to the Commission's jurisdiction. United operates in the States of Texas, Louisiana, Mississippi, Alabama, and Florida, and Continental is an independent producer of natural gas.

On January 22, 1953, Continental and United entered into a contract covering the sale and purchase of gas and ordered:

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[2] The Commission has not issued any substantive rules as to general policy and interpretations relating to abandonment under the Natural Gas Act.

produced by Continental in the Johnson Bayou Field in Cameron Parish, Louisiana. The contract price was 8.0973 cents per Mcf at 15.025 psia during the five-year period commencing January 31, 1953, when gas deliveries commenced; and on and after January 31, 1958, the price was 8.997 cents per Mcf at 15.025 psia, plus tax reimbursement amounting to 1.8 cents per Mcf. The contract was for a primary term of 10 years, and was to continue in effect after expiration of the primary term for successive periods of one-year each, unless either party terminated the contract at the end of the primary term, or any succeeding annual period, giving the other party 90 days' prior written notice. Under this contract, United, while having the right to purchase the gas, is not obligated to take all or any proportion of the gas produced, and in the event gas is not taken, Continental may terminate the contract. United did agree to take ratably in the same proportion as to other purchases that it was or might make in this field. The only purchases that United did make in this field were from Continental at the rate of one to one-and-a-half million cubic feet per day.

The Johnson Bayou Field is located near United's 16-inch transmission line which extends westward from the area of the Mud Lake Field in southwest Louisiana into the Beaumont, Texas, area. This 16-inch line was already in place when United executed the contract with Continental in 1953, and Continental agreed to deliver the gas produced in the Johnson Bayou Field to a central point located adjacent to the line. In order to make the gas so received suitable for sufficient pipeline transmission, to meter it and to receive it into the 16-inch line, United constructed a separator, meter station, and 55 feet of 4-inch line at a total cost of $6,884. United has not removed these facilities and they remain in place and can be used at any time. Continental, in order to effectuate the sale

and delivery of gas to United, constructed approximately 4,400 feet of 2½-inch line, two separators and storage tanks adjacent thereto. The title to the gas passed from Continental to United at the interconnection between the above facilities, and such gas was taken into United's system and transported by United to the vicinity of Beaumont, Texas, where it was sold for resale and to consumers for their own use.

The above contract was filed by Continental with the Commission on November 30, 1954, as its FPC Gas Rate Schedule No. 115. On October 23, 1962, Continental having become dissatisfied with the contract notified United that it elected to terminate the contract as of January 31, 1963, to which United raised no objection. Thereafter, in November 1962, Continental sought to obtain from United a new contract for a 20-year term at an increased price of 14 cents per Mcf, plus 1.75 cents tax reimbursement, for the first five years and thereafter with stated increases of one-cent for each five-year period provided that Continental could charge the applicable price as determined by the Commission in Area Rate Proceedings if that price should be higher than the contract price. United was not willing to pay the increased price demanded by Continental, nor did it need this particular gas to meet its customers' requirements. United in turn advised Continental it could and would support an application to the Commission for abandonment by Continental of this sale. United also offered to contractually agree to continue buying Johnson Bayou Field gas on a day-to-day basis at the existing contract rate. This was unacceptable to Continental.

On December 28, 1962, Continental filed with the Commission a unilateral change in its rate schedule to become effective as of January 31, 1963. This change included an

increase in the rate to be charged for the Johnson Bayou Field gas to 15.75 cents per Mcf at 15.025 psia (14¢ plus tax reimbursement of 1.75¢ per Mcf). The filing referred to the cancellation of the contract, as follows:

> "After unsuccessful efforts to renegotiate the contract with United, Continental advised United by written notice dated October 23, 1962, that Continental elected to terminate the contract at the end of the primary term, on January 31, 1963. United acknowledged this notice of termination. The notice of termination and acknowledgment are attached as Exhibit 'A' to this Change in Rate Schedule.

> "Pursuant to the certificate of public convenience and necessity issued to Continental by Commission order on January 4, 1956, and Continental's FPC Gas Rate Schedule No. 115, Continental proposes to continue the sale of gas to United from Johnson's Bayou Field covered under such certificate and rate schedule at the rate herewith filed by this Supplement No. 7 to said Rate Schedule."

It was necessary for Continental to cancel the contract as no provision was incorporated therein which would permit the increase here demanded by Continental. The effect of this filing was a substitution of a new schedule naming the rates and charges for gas proposed to be sold to United together with the terms and conditions of the sale in place of the previous contract entered into between United and Continental. The Commission allowed this new schedule to become effective as requested, over the protest of United. This action resulted in United not being under any contractual obligation to purchase the gas from Con-

tinental.[3] United, by letter dated January 28, 1963, notified Continental that it would discontinue the purchase of gas from Johnson Bayou Field on January 31, 1963. Since that date United has not purchased any gas from this field.

United's refusal to continue the purchase stems from Continental's letter of cancellation of the contract and the unilateral filing of the 15.75 cent rate. United does not need to purchase the Johnson Bayou Field gas to continue meeting the needs of its customers. United is currently paying for a large quantity of gas in south Louisiana which it cannot presently take into its system. These payments are substantial, amounting over a 2½ year period to approximately $15 million. Further, United believes that it can buy gas cheaper than the price of 15.75 cents named in Continental's unilateral filing. While United is not now seeking additional supplies, it has entered into gas purchase contracts at higher prices with certain producers in south Louisiana who were faced with a loss of lease for non-production and a very extensive drainage problem. Such purchases have been limited to production from a single well.

On February 1, 1963, Continental filed a petition with the Commission wherein it requested an order directed to United to show cause why United "should not be required to continue taking gas from Continental in accordance with Continental's Rate Schedule 115, as supplemented, and further order that United take such gas pending action upon the order to show cause." It will be noted that the Commission did not order United to show

cause as requested by Continental, but instead directed United to show cause as to why it should not be required to

[3] See also, Commission order denying application for rehearing issued March 18, 1963, *Continental Oil Company (Operator) et al.*

apply for and obtain Commission permission and approval before ceasing operations of the facilities used to purchase such gas.

In view of the arguments advanced by the parties, it is necessary to first place the issue here in its proper perspective. This proceeding is not a settlement of a contractual dispute between two parties, nor does it involve the terms and conditions of a sale of gas by Continental to United. Texas Eastern is apparently under a misapprehension as to the status of the certificate of public convenience and necessity issued by the Commission to Continental covering the above sale. In its brief Texas Eastern states that the certificate is limited to the particular contract. In *Sunray Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 153, the Court, in holding that the Commission had the right to issue permanent certificates, pointed out that a distinction existed between the service in which the producer is engaged and the contract which regulates the relationship in performing the service. The certificate issued to Continental relating to the Johnson Bayou gas on January 4, 1956, under Docket No. G-6949, was without limitation, and is as follows:

> "(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of this order, authorizing the sale by Applicant of natural gas in interstate commerce for resale, together with the continued operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully described in the application and exhibits in this proceeding."[4]

[4] The terms and conditions mentioned in the certificate authorization do not refer to the contract.

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In *Sun Oil Company* v. *Federal Power Commission*, 364 U.S. 170, the Court, in interpreting identical language in a Commission order granting a certificate of public convenience and necessity, held that the certificate issued was a permanent one, not subject to the term set forth in the contract.

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This brings us to the question raised by the show cause order as to whether or not the failure of United to purchase gas from Continental constitutes an abandonment under Section 7 (b). This Examiner is of the opinion that it does not constitute such an abandonment.

Staff counsel's position stems from the fear of a gap occurring in the regulatory process as it is related to continuous service to consumers, if United is not required to secure Commission approval before ceasing to purchase gas from Continental. To bring United within Section 7 (b), it is argued that the term "service" as used in this section includes the purchase of gas. This is not the position taken by the Solicitor General on behalf of the Commission in the above *Sunray* case. In the brief filed therein, the Solicitor General represented to the Supreme Court that the term "service" was the furnishing of gas to the purchaser. The Solicitor's statement is as follows (p. 23):

> "As that term is used in Section 7(e)—when read together with Section 7(b) and other provisions of the Act—the 'service' is the continuous furnishing of the gas to the purchaser."

There is no gap in the regulatory process by reason of the requirement that Continental must obtain approval under Section 7 (b) before abandonment of service. The issues under such an application could properly include any that might be raised if United was required to file an

application under Section 7 (b). The principal issue being the need of this gas to meet the demands off United's system.

Continental, in support of its position claims that "United has undertaken to abandon summarily a part of its service to its customers and the public by abandoning the receipt and purchase of gas upon which the customers and public rely." This argument overlooks the position of United and Continental existing as of today. No service has been abandoned by United. Further, it can call upon Continental to deliver Johnson Bayou gas if and when such gas is needed to meet customer demands and Continental is obligated to make such deliveries.

The purpose of the Natural Gas Act is to protect the consumer, who is the "public" that the Act refers to. This was recognized in *Hope Natural Gas Company* v. *Federal Power Commission,* 320 U.S. 591, 610, wherein the Court stated that the primary aim of the act was to protect consumers against exploitation at the hands of natural-gas companies. To this end, Section 7 (b) specifically prohibits abandonment of facilities and service rendered by means of such facilities except in accordance with the standards named

therein. United's facilities are still in place and can be operated at any time. The service referred to in Section 7 (b) in conjunction with the other provisions of the act refers to fulfilling the demands of the purchaser of gas, *i.e.,* the obligation on the part of the utility to satisfy the requirements of the consumer. The act is silent as to any requirement that the purchaser of gas secure a certificate. In *P. R. Rutherford et al.,* Docket No. G-10922, 23 FPC 357, 360, the Commission authorized Rutherford to abandon its sale to United Gas Pipe Line Company under similar

circumstances as here presented in that United had ceased the purchases of gas. Commissioner Connole in his concurring opinion pointed out that the Commission cannot compel a pipeline to purchase gas and that the certificate holder cannot be required to sell its gas if the buyer is unwilling to buy.

Additional Findings and Conclusions

Upon consideration of the record and the briefs filed in this proceeding, it is further found and concluded:

(1) United Gas Pipe Line Company's supply of natural gas is adequate to meet the demands for service off its system, and it has not abandoned any facilities or service by means thereof, within the meaning of Section 7 (b) of the Natural Gas Act.

(2) It has not been shown that permission and approval of the Commission is required by United Gas Pipe Line Company to cease the purchase of natural gas tendered by Continental from the Johnson Bayou Field, Cameron Parish, Louisiana.

Order

Wherefore, It Is Ordered, subject to review by the Commission, that the above-mentioned Order to Show Cause, issued on May 1, 1963, directed to United Gas Pipe Line Company, be and it hereby is dismissed and vacated.

Alvin A. Kurtz
Alvin A. Kurtz
Presiding Examiner

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Docketed Oct. 28, 1963

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CI63-979

CONTINENTAL OIL COMPANY

Presiding Examiner's Certification of the Record Accompanying Initial Decision

To THE SECRETARY:

In accordance with the provisions of Section 1.30 of the Commission's Rules of Practice and Procedure, I herewith file with you a copy of the record of the hearing held herein pursuant to the order of the Commission, including my report thereon. For that purpose, I am transmitting herewith one copy each of the documents described in Section I below:

I—Exhibits numbered and described as follows:

Exhibit No.	Description
1.	Field Map and Estimated Reserves of Continental Oil Company Johnson Bayou Field, Cameron Parish, Louisiana.
2.	Document consisting of nine pages, the first three of which are an assignment, the fourth a resolution, the following three pages headed "Oil, Gas and Mineral Lease," and the last two pages a second resolution.

Both of the above-described exhibits were received in evidence.

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II—(a)—Items of evidence by Reference—The following documents were offered in evidence pursuant to Section 1.26(c)(2)(i) of the Commission's Rules of Practice and Procedure:

Item	Description
A.	Gas purchase contract, on file as Continental Oil Company, FPC Gas Rate Schedule 115, dated January 22, 1953.
B.	Letter bearing the letterhead "Continental Oil Company," addressed to United Gas Pipeline Company, dated October 23, 1962.
C.	Letter bearing the letterhead of United Gas Pipeline Company, addressed to Continental Oil Company, dated December 17, 1962.

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Item	Description
D.	Letter on the letterhead of United Gas Pipeline Company, addressed to Continental Oil Company, dated December 20, 1962.
E.	Letter on the letterhead of United Gas Pipeline Company, addressed to Continental Oil Company, dated December 26, 1962.
F.	Letter on the letterhead of Continental Oil Company, addressed to United Gas Pipeline Company, dated December 28, 1962.
G.	Commission's letter order dated January 25, 1963, addressed to the Continental Oil Company.
H.	Principal natural gas pipelines in the United States and communities served with natural, manufactured and mixed gas, FPC, dated 1960.

I. Letter of January 28, 1963, from United Gas Pipeline Company to Continental Oil Company, signed by Mr. Barnett, Vice-President, for United.

J. Telegram dated January 30, 1963, to Mr. C. C. Barnett, United Gas Pipeline Company, signed Bruce R. Merrill, Continental Oil Company.

K. Telegram dated January 31, 1963, to Bruce R. Merrill, Legal Department, Continental Oil Company, signed United Gas Pipeline, by C. C. Barnett, Vice President.

All of the foregoing Items by
Reference were received in evidence.

I hereby certify that the official stenographer's report of the hearing held herein, beginning and concluding on June 3, 1963, consisting of Volumes 1 and 2, inclusive, containing pages 1 to 139, inclusive, the exhibits and other documents received in evidence as stated in Sections I and II, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision herein.

APPEARANCES

During the course of the hearing herein, the following appearances were entered:

For Continental Oil Company

Tom Burton
Bruce R. Merrill

For United Gas Pipe Line Company

W. O. Crain
Saunders Gregg
David Klotz
Vernon Woods
Willis L. Meadows

For Texas Eastern Transmission Corporation

Jack D. Head
Keith M. Pyburn
Joseph F. Weiler

For the Staff of the Federal Power Commission

C. Louis Knight

Dated at Washington, D. C., this the 28th day of October, 1963.

ALVIN A. KURTZ
Alvin A. Kurtz
Presiding Examiner

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Docketed November 15, 1963

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

DOCKET No. CI63-979

In the Matter of:

CONTINENTAL OIL COMPANY

Continental Oil Company's Exceptions to the Presiding Examiner's Initial Decision

Now comes CONTINENTAL OIL COMPANY (Continental), Petitioner in the captioned proceeding, and submits the following exceptions to the "Presiding Examiner's Initial Decision Upon Order to Show Cause" issued October 28, 1963.

EXCEPTIONS

Continental excepts to the order of the Examiner which would dismiss and vacate the Order to Show Cause issued by the Commission against United Gas Pipe Line Company (United). More specifically, Continental excepts to the following findings and conclusions of the Examiner:

"(1) United Gas Pipe Line Company's supply of natural gas is adequate to meet the demands for service off its system, and it has not abandoned any facilities or service by means thereof, within the meaning of Section 7(b) of the Natural Gas Act.

"(2) It has not been shown that permission and approval of the Commisison is required by United Gas Pipe Line Company to cease the

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purchase of natural gas tendered by Continental from the Johnson Bayou Field, Cameron Parish, Louisiana."

(Examiner's Decision, p. 8.)[1]

Restated, Continental excepts to the following findings of fact and conclusions of law:

(1) That United has not abandoned any facilities or service within the meaning of Section 7(b) of the Act.

(2) That United is not required to obtain permission and approval of the Commission to cease the purchase of the Johnson Bayou gas.

(3) That United's supply of gas is adequate to meet the demands for service off its system and United does not need the Johnson Bayou gas.

STATEMENT OF THE CASE

This case involves Continental's petition for an order requiring United to show cause why it should not be required to continue to take gas produced by Continental from the Johnson Bayou Field, Cameron Parish, Louisiana, in accordance with Continental's lawfully effective rate schedule.

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The basic facts affecting the Johnson Bayou sale and purchase between Continental and United are undisputed.

[1] The Examiner correctly concludes that Continental's rate schedule would provide all the terms for the sale and purchase of gas. Therefore, no issue is presented as to United's obligation to take ratably. Continental's brief in support of the petition for a show cause order and reply brief to the Examiner fully cover this ratable take obligation, which is required both by Continental's effective rate schedule and by the Louisiana Common Purchase Law, 30 La. Rev. Stat. § 42, cited in the earlier briefs.

Continental and United entered into a contract on January 22, 1953, covering the sale and purchase of gas produced by Continental in the Johnson Bayou Field. The initial contract price was 8.0973¢ per Mcf and increased on January 31, 1958, to 8.997¢ per Mcf plus tax reimbursement of 1.8¢ per Mcf. The contract provided for a primary term of ten years, with a provision to continue in effect thereafter for successive one-year terms unless terminated at the end of the primary term or thereafter upon due notice. (Tr. 15, Item A)

Prior to the expiration of the primary term of the contract, on the parties endeavored to negotiate a new contract. These negotiations were unsuccessful, since the parties were unable to agree upon a mutually satisfactory price, contract term, or other provisions. Continental thereupon gave the requisite notice to United on October 23, 1963, that Continental elected to terminate the contract at the end of the primary term on January 31, 1963. United duly acknowledged receipt of notice of this termination, and the contract was terminated accordingly. (Tr. 16, Item B)

Continental filed on December 28, 1962, a unilateral change in rate under Rate Schedule No. 115 covering the Johnson Bayou sale. This unilateral change in rate provided for an increased rate of 15.75¢ per Mcf inclusive of

tax reimbursement (the applicable rate level for increased rates the Commission set under Statement of General Policy No. 61-1) to become effective as of January 31, 1963, after termination of the contract. This unilateral rate change was accepted by the Commission to become effective without suspension. United protested the filing of the unilateral change in rate and sought rehearing of the Commissions order permitting the rate to become

effective. (Tr. 29) The Commission denied United's application for rehearing on March 18, 1963, and United did not take timely review of this order as provided by Section 19(b) of the Natural Gas Act. (Tr. 30)

Just two days prior to January 31, 1963, United advised Continental that it would not continue to purchase gas from the Johnson Bayou Field after that date. (Tr. 15, Item I) Disregarding Continental's demand that United continue to take gas from the Johnson Bayou Field in accordance with Continental's effective rate schedule, United did in fact cease taking gas from Continental at Johnson Bayou Field on January 31, 1963, and has not taken any gas from this field since that time. (Tr. 15)

Faced with United's deliberate and arbitrary action in ceasing takes from Continental's wells at Johnson Bayou Field, Continental on February 1, 1963, filed its petition for an order requiring United to show cause, if any, why United should not be required to continue taking

gas from Continental in accordance with Continental's effective rate schedule. Following submission of extensive briefs by Continental and United, the Commission on May 1, 1963, issued an order directing United to show cause why it should not be required to apply for and obtain Commission permission and approval before ceasing operation of the facilities used to purchase the Johnson Bayou gas. A hearing upon the show-cause order was held June 3, 1963, and the matter thereupon submitted to the Presiding Examiner for his initial decison upon briefs.

The Issues

The Commission's show-cause order is directed to United's duty to obtain permission and approval of the

Commission before ceasing operation of its facilities used to take Johnson Bayou gas. Continental's petition was cast in terms of an order to require United to continue to take gas from Johnson Bayou unless permission first be obtained for abandonment. Essentially, the show-cause order issued by the Commission reaches the same issues raised by Continental's petition.

The difference, if any, lies in the Commission's emphasis on the abandonment of facilities operated by United, while Continental's petition raises the issue of abandonment of service as well as of facilities. However, the two concepts are inseparable. Continued operation of the facilities

used to take Johnson Bayou gas can only be effected by taking gas through the facilities. This would also effectuate a continuation of the service embraced by taking gas into United's system.

The Examiner recognized that the show-cause order raised the fundamental issue of whether United's cessation of takes and failure to purchase gas from Continental constitutes abandonment under Section 7(b) of the Natural Gas Act.[2] Simply stated, the issue is whether United is required to take gas from Continental at Johnson Bayou unless Commission permission and approval for abandonment first be applied for and obtained.

ARGUMENT

As set forth above, Continental's exceptions are directed to three basic findings and conclusions of the Examiner: (1) that United has not abandoned any facilities or service within the meaning of Section 7(b) of the Act;

[2] Hereafter called Act.

(2) that United is not required to obtain permission and approval of the Commission to cease the purchase of the Johnson Bayou gas; and (3) that United's supply of gas is adequate to meet the demands for service off its system and United does not need the Johnson Bayou gas. The first two findings and conclusions involve the basic issue stated above and shall be discussed together. The finding of fact with respect to United's supply and need for the Johnson

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Bayou gas, Continental submits, is immaterial in these proceedings. Continental further submits such finding of fact is unsupported by the record. Continental's exception with respect to this finding shall be discussed following the other exceptions.

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EXCEPTIONS 1 AND 2

United is Required to Continue to Take Gas Unless Abandonment is Permitted under Section 7 (b)

The fundamental error of the Examiner lies in his conclusion that United's action in ceasing to take gas from Continental does not constitute abandonment of facilities or service for which United must obtain permission of the Commission under Section 7(b) of the Act. This issue must be considered in the light of the landmark Supreme Court decision in *Sunray Mid-Continent Oil Company v. FPC*, 362 U.S. 1392 (1960). *There the Supreme Court specifically held that gas reserves once committed by contract to a transportation or sale subject to jurisdiction of the termination of the contract between producer and pipeline.*[3]. The Supreme Court ruled that Sunray, the producer

[3] See also *Atlantic Refining Co.* v. *FPC*, 360 U.S. 378, 389 (1959).

in that case, was required to continued to sell gas to United, the pipeline in that case, under Sunray's certification and effective rate schedule upon termination of the existing contract between Sunday and United, unless the Commission permitted abandonment under Section 7(b) of the Act.

It become clear at once that the Act takes over where the contract leaves off. The Act imposes an obligation on the seller to continue to sell. The seller must have the corresponding right to sell. For this right to exist, the Act must impos an obligation on the buyer

to buy. If the Act is to impose the obligation to sell, equity demands that the Act also impose the obligation to buy.

Prior to termination of their contract, Continental and United were engaged in a sale and purchase of gas subject to the jurisdiction of the Commission. Termination of their private contractual relationship did not relieve either Continental or United of obligations imposed by virtue of the Act to continue the sale and service already committed to the public interest and subject to the jurisdiction of the Commission. These obligations can cease only upon compliance with Section 7(b).

While *Sunray* speaks of continuation of a "sale" by a producer, the producer's sale is necessarily the pipeline's purchase. Sale and purchase are but the two sides of a single coin. One cannot exist in a vacuum apart from the other.

Similarly, the concepts of service and facilities for rendering service are interdependent concepts inseparable from sale and purchase. There must be a sale and purchase for there to be a movement of gas in interstate commerce upon which a service can be predicated. There

must also be a sale and purchase of gas and consequent movement in interstate commerce to justify the facilities required to render a service. Facilities are not constructed

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except to take gas, and to render service. Were it not for the sale, purchase, and transportation the Commission would not issue a certificate for the construction and operation of the facilities necessary to effectuate such sale, purchase, and transportation.

Once a certificate issues and facilities are built all of the applicable sections of the Act become operative as to the facilities and the service rendered by use of such facilities. The abandonment provision of Section 7(b) becomes operative at once. Cessation of operation and use of facilities, as in this case, with no intention to resume operation, is an abandonment of facilities within the meaning of Section 7(b).[4] In analogous cases involving discontinuation of operation of railroads, the courts have consistently held that cessation of operation and use of facilities abandonment of the facilities and service involved. *Smith, Trustee, v. Hoboken Railroad, Warehouse and Steamship Connecting Co.*, 328 U.S. 123, 130 (1946); *Thompson, Trustee, v. Texas Mexican Ry.*, 328 U.S. 134, 148 (1946); *Meyers v. Jay Street Connecting R.R.*, 259 F. 2d 253, 535 (2d Cir. 1958).

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United's action in ceasing to take gas in Johnson Bayou not only constitutes an abandonment of the facilities which United had ceased to operate, but also constitutes an abandonment of service rendered by means of those facili-

[4] Webster's Third New International Dictionary, Unabridged (1961) defines "abandon" to mean "to desist for using," "ceasing to operate often," "to permit to cease or lapse."

ties. This service includes the transportation of the gas in interstate commerce and the continuous furnishing to United's customers of the committed supply of gas available from the Johnson Bayou reserves. The Supreme Court clearly set forth the cardinal principle of service to the consuming public in the *Sunray* case, *supra*.

In construing the Act to distinguish between a specific expression of a sale as defined by a contract and the overriding and continuing service initiated by that sale, the Court in *Sunray* rejected the contention that the Act speaks only in terms of the specific "sale" contemplated by the parties rather than in terms of a "service" in the movement of gas in interstate commerce, and noted that the initial contractual sale is merely a commencement of the service. 364 U.S. at 149. In reference to the overriding public service involved in the sale of gas, the Court stated at the next page:

> "Thus, it is evident that all the matters for which a certificate is required—the construction of facilities or their extension, as well as the making of jurisdictional sales—must be justified in terms of a 'service' to which they relate. Accordingly, § 7(e) itself gives positive indication that the 'service' which the Commission's certificate may authorize is something quite apart from simply the specific sale which § 7(c) forbids without a certificate sufficient to authorize them."

The Court recognized that the Commission had long accepted the same view, stating further at 364 U.S. 153:

> "Further, the Power Commission has from an early date taken the view that there is a continuing obligation to perform 'service' imposed by the Act which outlasts the terms of a seller's original contract of sale. As early as 1942 it held that an abandonment of service after the expiry of such a contract had to

have Commission approval under § 7(b). *United Gas Pipe Line Co.*, 3 F.P.C. 3, 9."

The rationale of the Supreme Court in the *Sunray* case applies as much to the pipeline as to the producer, since the concept of "service" there dealt with by the Court was one of service to the consuming public. Fulfillment of the ultimate public interest cannot permit the service of one party to the sale, either pipeline or producer, to be regarded differently than the service effectuated by the other because when abandonment is the issue, continuity of service is the determinant of the public interest.

Recognizing the interrelationship of the functions of sale and service performed by both the pipeline and the producer, the Court stated at 364 U.S. 143:

"The identical provisions of the Natural Gas Act regulate pipeline companies as well as independent producers. If producers can insist in their certificates on the inclusion of a provision relieving them in advance from their obligation to continue the supply of gas, as of a date certain, pipeline companies—whose dealings with local distributing companies generally also take the form of a 'sale' of gas to them—could insist on a similar

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provision. * * * If the pipeline company were left free to cease its service to the local distribution company, a local economy which had grown dependent on natural gas as a fuel would be at its mercy."

and continued at page 147:

"When attached to the leverage of a power to abandon service, at a contract's termination, without contemporaneous Commission approval, this power to exercise contractual control not only over rates but over the mode of their regulation, would be a substantial one indeed. And like the power to force an advance

license for the abandonment of the continued supply of gas, the *power would be one enjoyed by pipeline companies and producers alike.*" (Emphasis added.)

In rejecting the contention that a producer has the power to control contractually the mode of regulation affecting abandonment of a sale and the related service, the Court thus also rejected the notion that a pipeline could similarly limit a purchase and the related service.

While properly recognizing that the *Sunray* case distinguished between the service which is subject to the Commission's jurisdiction under the Act and the contract which regulates the initial relationship between producer and pipeline engaged in performance of that service, the Examiner erroneously limits the rationale of the *Sunray* doctrine to a narrow concept of service from the producer to the pipeline. Referring to the Solicitor General's brief filed on behalf of the Commission with the Supreme Court in the *Sunray* case, the Examiner concludes that "service" within the meaning of Section 7 of the Act is the continu-

ous furnishing of the gas to the purchaser. In the context of the *Sunray* case, which involved the contention that the producer was not required to continue service, the Solicitor General's statement is undoubtedly correct.

However, the *Sunray* case did not put squarely in issue the other side of the producer-pipeline relationship which is presented by this case. In the present case, the producer is willing to sell gas to the pipeline, which is unwilling to buy the gas. The threat of a discontinuation of service to the consuming public arises in this case not from the desire of the producer but from that of the pipeline. It is not enough to say that service embraces the continuous furnishing of gas by the producer to the pipe-

line. The Commission must here consider the further course of that service, which must embrace the continuous furnishing of gas by the pipeline to the ultimate consumer. The Solicitor General's statement in brief in the *Sunray* case did not bear directly upon this aspect of service, since that was not the issue in *Sunray*. However, the underlying rationale of service expressed by the Solicitor General supports rather than limits Continental's position in this case. The concept of service as a continuous furnishing of gas by producer to pipeline and by pipeline to distributor and ultimately to the consuming public is exactly the concept of service which Continental submits compels the conclusion that United must continue taking

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gas in this case. It will be small comfort to the consumer who gets no gas that it was the pipeline which ceased service rather than the producer.

Indeed, the Solicitor General's brief itself gives further expression apropos this broader concept of service. Specifically relating the abandonment requirement of Section 7(b) to continuity of service by a natural gas company, the following statement appears at pages 25-26 of the brief:

> "Section 7(b) is a necessary concomitant to the Commission's regulation of the rates for jurisdictional sales and transportation of natural gas, for if a natural gas company could abandon these services at will, rate regulated companies threatening to cease services upon which the public has become dependent. *This would be true whether or not the abandonment would result in the immediate cessation of service to any ultimate consumer. Even if a substitute supply of gas might be obtained without the curtailment of any service to ultimate consumers, it would usually be obtained only at higher cost to the pipeline*—certainly at least to the extent that the construction of new

facilities by the pipeline to replace service from undepleted reserves would result in an increased rate base for the pipeline—which would be reflected in higher rates for the ultimate consumer." (Emphasis added.)

Even though the abandonment of a sale, or purchase, would not result in the *immediate* cessation of service, the Solicitor General recognized the threat to effective regulation if the natural gas company were permitted to abandon services at will. And significantly, even if the pipeline could acquire a substitute supply "if and when" needed,

there would invariably be higher costs than involved in the continuation of the existing sale, particularly in construction of new facilities. Just such concerns are fact in this case. The record shows that since deciding to cease taking Continental's Johnson Bayou gas, United has contracted for similar or smaller reserves at prices from 18c to 19.75c per Mcf, with anticipated costs for constructing facilities by United up to $30,000. (Tr. 30-34, 51) The Johnson Bayou reserves are available to United at 15.75c per Mcf through facilities already constructed and amortized at a total cost of $6,000. (Tr. 25, 51)

United has for ten years obtained a part of its system's supply of gas from the Johnson Bayou Field reserves committed by Continental. The Commission determined that Continental's total recoverable Johnson Bayou reserves were necessary to provide an adequate gas supply for United when the Commission issued an order granting Continental's certificate at Docket G-6949. A finding that United needs these reserves was implicit in the finding in that order that the present or future public convenience and necessity required certification of Continental's sale. Although United did not obtain a certificate to "purchase"

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the gas covered by Continental's sale, United did construct facilities, including a separator, meter station, and four-inch gathering line, under certificate authority from the

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Commission for the specific and sole purpose of taking and purchasing the gas produced by Continental in the Johnson Bayou Field.

The Johnson Bayou reserves thus attached to United's system provide part of the total supply from which United transports and sells gas to its customers and to the consuming public. The record shows that the reserves committed by Continental, which have been produced for ten years, will not be depleted for another sixteen years. (Tr. 90) United's action in ceasing to take these reserves would result in depriving United's customers of gas for over half of the recoverable life of the reserves in this field. This action, taken without permission and approval of the Commission for abandonment under Section 7(b), leaves the consuming public completely at the pipeline's mercy in determining the continuity and adequacy of the gas supply available to the public dependent upon that pipeline.

Assurance of continuity and adequacy of gas supply is a fundamental consideration underlying the Section 7(b) requirement that permission and approval of the Commission be obtained upon hearing and finding that the public convenience and necessity permits abandonment of any jurisdictional factilities already in service. The same consideration of protecting the consumer in the continuation and adequacy of service is the rationale of the *Sunray*

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case. If the Act is to supplant the contract, then the Commission must be the arbiter and protector of the pub-

lic interest in determining whether adequate and continuing service is afforded the public. Neither pipeline nor producer can usurp this lawful function and jurisdiction of the Commission by ceasing in any manner a service once extended to the public and relied upon by the ultimate consumers.

Yet United in this case has summarily taken a course of action which inescapably results in abandonment of part of its service to its customers and the public by discontinuing receipt and purchase of gas upon which the customers and public have come to rely. Albeit the Johnson Bayou reserves are only a part of United's total supply, the finding that the public convenience and necessity permits abandonment of this part of United's total supply is a finding that the Commission alone can make upon hearing under Section 7(b) of the Act. United cannot be left to decide what are the requirements of public convenience and necessity any more than Continental.

It will not suffice to say, as does the Examiner, that Continental's argument overlooks the position of the parties existing "as of today," and that no service has been abandoned because United can still call upon Continental to deliver Johnson Bayou gas "if and when" such gas is needed. No producer can long endure simply shut-

ting in producing leases to await the beck and call of the pipeline which may want to take the gas one year, five years, or ten years hence. The producer would be financially devastated by such an erratic and speculative pattern of takes, if any. Revenues could not be predicted with any certainty, and the financial integrity of the producing industry would be seriously impaired. Secondly, the leases would be subject to forfeiture for cessation of production in most cases. In this case, Continental's John-

son Bayou lease is still held by oil production, but if that production should ever cease the lease would be forfeited automatically if gas production were not first resumed.

Even more importantly, the facts in this case show that the Johnson Bayou gas simply will not be available to United to take at its beck and call in later years if United does not maintain ratable takes during the entire remaining recoverable life of the field. Continental is at this moment subject to drainage by other producers in the Johnson Bayou Field who do not sell their gas to United. (Tr. 59, 90) Neither Continental, United, or the consumers relying on gas served by United's system can ever recover the gas which has been lost and is continuing to be lost by drainage. Any pipeline which shuts in producing wells for a prolonged period in a field in which other purchasers are taking gas effectively abandons the gas re-

serves which are lost by drainage and the service which would be performed by delivery of those reserves to its consumers. It cannot later come in "if and when" it decides it needs more gas, and take what has already been lost. Often, gas is sold interstate and intrastate from the same field.

The danger of permitting the pipeline to discontinue its service to local customers and consumers is specifically pointed out by the Court in the *Sunray* case, *supra,* 364 U.S. 137, 143:

> "If the pipeline company were left free to cease its service to the local distribution company, a local economy which had grown dependent on natural gas as a fuel would be at its mercy."

This is true whether the pipeline seeks to abandon all or only a part of its service and the underlying supply

upon which that service depends. The Examiner erred in considering the service rendered by the pipeline to the public to be affected only by the position of the producer and pipeline "as of today." The statutory standard of public convenience and necessity by which the service of a natural gas company must be measured involves the present *or future.* The Act does not distinguish between producers and pipelines. The effect of United's abandonment of takes from Johnson Bayou Field and the consequent loss of the remaining field reserves which constitute part of United's gas supply cannot be judged only by looking to United's present

capacity to deliver gas to its customers in 1963. Over the next sixteen years ,the Johnson Bayou reserves should be part of United's supply, but regardless of how long the field reserves would last, United's action in ceasing takes of these reserves would jeopardize over 6,000,000,000 cubic feet of remaining reserves now committed to United's system. Sooner or later, at some cost, United will have to replace these 15.75c per Mcf reserves. The evidence shows that United is *currently* replacing similar or smaller reserves at prices of 18.5c per Mcf.

In the early years of pipeline regulation and long before the advent of producer regulation and before the Supreme Court's decision in *Sunray,* this Commission decided that United could not abandon a service to a particular customer. *United Gas Pipe Line Company,* 3 FPC 3 (1942). While the Commission there dealt with the narrow effect of an abandonment by United upon one customer, this case presents the effect of an abandonment of the service of providing a continuous and adequate supply of gas by United to all of its customers. If United can cease continuation of the sale and purchase of gas at Johnson

Bayou Field, then it could equally well abandon, field by field, every sale and purchase in which it is engaged by ceasing to take from one producer at a time or from all producers at once just as soon as contract terms expire. If United could abandon taking the Johnson Bayou gas

reserves, there would be no reason why United could not cease taking other reserves, which would evenutally cripple its system and leave the consumers attached to that system without an adequate supply of gas.

Gas reserves in thousands of reservoirs covered by contracts subject to the Commission's jurisdiction will not be depleted within the customary twenty to twenty-two year contract terms. Thousands of reservoirs will have substantial remaining reserves after expiration of the contracts. However, it is the total recoverable reserves through depletion of the reservoirs, and not merely the reserves which might be recovered during the primary terms of the contracts, that by the Act are committed to the consuming public.

All of the recoverable reserves have been relied upon by the pipelines purchasing such reserves in support of their applications for certificates of public convenience and necessity to transport gas and to construct necessary facilities. Every valve, every piece of pipe, every compression facility, dehydrator or separator installed by pipelines, was installed and certificated to accommodate the sale and transportation of the total recoverable reserves initially committed under their various contracts, not merely that portion of the reserves that might reasonably be expected to be produced during the term of the contract.

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Yet, under the Examiner's construction of the Act, by permitting the pipeline, at will, to discontinue takes of gas upon contract expiration the remaining reserves, no matter how great or how long thereafter production could economically be maintained, may well be lost to the interstate consuming public. Certificated facilities could be allowed to deteriorate into uselessness.

Such a result deprives the consuming public of the assurance of an adequate and continuing supply of gas, and offends sound principles of conservation which would dictate that the remaining recoverable reserves continue to be taken by the pipeline to whose system they are already connected. *Moreover, such a result would deprive the producer of his property without due process of law, since he is afforded no opportunity to market his gas already committed to the pipeline.*

Under the Examiner's finding it would be useless for a producer to try to negotiate a new contract at the termination of his existing contract because he would have absolutely no bargaining position. He would be saddled with an obligation to sell while the pipeline is free to buy or not buy. The Act was not intended to create any such inequity as this. No fair construction of the Act could condone such an inequity. It is only because the business of selling and transporting natural gas in interstate commerce is charged with a public interest (Sec.

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1(a)) thas such activities have been by law subjected to Federal regulation. Sound regulation will recognize the interest of the consuming public in a continuing supply of gas and will not permit inequities to exist under the Act which will result in interference with such supply.

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The Examiner has held that the purchase and taking of gas by United does not constitute a service within the meaning of Sec. 7(b) of the Act, and found that United's action in ceasing to purchase gas does not constitute abandonment of any service under Sec. 7(b). The Examiner is obviously in error because the transportation, the resale, admittedly services, and the operation of the facilities therefor, all requiring certification, cannot come into being or exist at all without the purchase and take of gas upon which all depend. When does the "service" begin and when does the "service" end? It begins at the beginning, with the purchase of gas, it continues with the take of gas, with the transportation thereof, and does not end until the resale and delivery by the pipeline of the gas initially purchased. All of this is the "service" of the pipeline "natural gas company" under the Act. These are the pieces of which "service" is made, and there is a gap in regulation unless jurisdiction reaches each of the pieces. The pieces cannot exist alone. They are mutually interdependent. Would it serve the purpose of the Act if the Commission should grant certificates to trans-

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port gas and to construct factilities therefor and then leave it to the pipeline as to when and whether it will use such facilities or transport such gas? The answer must be that it would not.

Turning to the Examiner's reference to the dictum of Commissioner Connole in the *Rutherford* case, 23 FPC 357, 360, Commissioner Connole's conclusion is in conflict with the *Sunray* case and was expressed prior to the Supreme Court's decision in that case. The dictum referred to in the concurring opinion in *Rutherford* to the effect that the Commission cannot compel a pipeline to purchase gas and the producer cannot be required to sell gas just cannot

be sustained in the face of the subsequent Supreme Court holding in *Sunray*. Commissioner Connole apparently considered the law at that time to be that neither pipeline nor producer could be compelled to continue a sale or purchase after termination of a contract. The Supreme Court in *Sunray* laid to rest one false premise of this proposition; the other equally false premise must also fall.

Aside from the incorrectness of Commissioner Connole's statement in *Rutherford*, the Examiner would apparently infer that on the authority of *Rutherford* the Commission would be required to permit a producer to abandon a sale whenever the pipeline was unwilling to take the gas. Even if this were correct law, the Examiner's conclusion is inconsistent with his own prior suggestion that

the producer's gas would always be available to the pipeline to take at a later time. If the producer were automatically permitted to abandon any sale when the pipeline would not purchase the gas, then the pipeline could not later have that gas still available at its call.

Under the Examiner's construction of the Act, even where a producer has sought to abandon sale and has been refused the right to abandon by the Commission, the pipeline could nevertheless abandon the purchase. Again there is clearly a regulatory gap. The Commission is powerless to prevent the pipeline from doing what it has just prevented the producer from doing. The Commission is also effectively deprived of its jurisdiction over abandonment when, as in the instant case, the producer does not desire to cease his sale and delivery, but the pipeline desires to cease its purchase and take. It makes no sense for an Act to provide the Commission with an opportunity to allow or disallow such a cessation when it involves a producer but not when it involves a pipeline.

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EXCEPTION (3)

The Finding Regarding United's Need and Adequacy of Supply is Immaterial and Unsupported by the Record

Over Continental's objections (Tr. 17, 23, 24), United introduced certain evidence as to its take-or-pay situation intended to show that United does not need the Johnson Bayou gas reserves. The Examiner admitted this evidence and found in his decision that United's gas supply is adequate and it does not need the Johnson Bayou gas to meet the needs of its customers, and further concluded that United has not abandoned any service. (Examiner's decision, pp. 4, 5, 7, 8) Continental excepts to the admission of this evidence and these findings.

Underlying the Examiner's findings is a syllogism running as follows:

> Major premise: United has an adequate supply and does not need Continental's gas.
>
> Minor premise: Because United does not need that gas, United has not abandoned service.
>
> Conclusion: Therefore, United is not required to apply for Sec. 7(b) abandonment to cease taking gas.

By the Examiner's reasoning, if United *did* need the gas, United would be required to apply for abandonment. The fallacy of this reasoning should be apparent. Under this conclusion, the Commission's jurisdiction to determine whether United and the public it serves need gas could not be exercised unless it is first determined that United

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does need gas. Even the Examiner cannot consistently accept this bootstrap concept of jurisdiction; he admits at page 7 of the decision that need is an issue which follows, not precedes, the attachment of jurisdiction over abandonment.

Assuming that United's supply is not adequate and that it does need the Johnon Bayou gas, the Examiner would then infer that United would be abandoning service to cease taking that gas, and United consequently would have to apply for abandonment under Sec. 7(b). Yet in such a case who is to determine whether United needs gas? The Examiner's finding would leave the power to decide whether the Commission has jurisdiction over United in United's hands. Congress, however, has clearly put this power in the Commission. The Act does not give the Commission a sometimes jurisdiction over abandonment, depending on whether the pipeline "needs" the gas which it would cease purchasing.

The legislative history of the Act reveals that Congress did not intend to limit jurisdiction over abandonment only to cases where service would not be impaired or, in other words, the pipeline did not need the gas. Just such a limitation in a draft of H.R. 4008 (75th Congress, 1st Session) was rejected. Thus the 75th Congress, which passed the Natural Gas Act, specifically considered and rejected a proposal that would have limited jurisdiction over abandonment to cases where the pipeline's service would be impaired.

Since need or lack of need for gas is an issue which must be considered upon hearing by the Commission *in an abandonment proceeding*, such issue is not material in this proceeding to determine whether the Commission has jurisdiction *vel non* to require United to file an application for abandonment. Whenever United or Continental might file for abandonment, then the issue of need, as related to the public convenience and necessity permitting abandonment, may properly be raised.

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Even assuming, however, that evidence of need were material in this proceeding, the Examiner's findings are not supported by the record. The record shows, from testimony of Mr. Barnett, vice president of United, that on several occasions subsequent to notice of termination of Continental's contract, and even subsequent to ceasing takes from Johnson Bayou, United has bought additional reserves of gas at prices of 18-19.75c/Mcf including tax. (Tr. 30-34) These new contracts are for comparable, or slightly smaller reserves than those remaining at Johnson Bayou, and in one instance may require United to install facilities at a cost up to $31,000 to take the gas. (Tr. 50) Mr. Barnett also admitted that United actually has a "good market" for the Johnson Bayou gas in the Beaumont area. (Tr. 48) As the clincher, he revealed that, far from having an adequate supply of gas as the Examiner found *United in fact has a present shortage of gas* in the Monroe

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area, to which United is now moving gas from South Louisiana! (Tr. 74-75, 78) This is hardly a record to support a finding that United does not need gas.

The only evidence United presented to support the claim that it does not need gas was to the effect that United has been paying for gas not taken under other contracts. Yet the evidence also shows that United has been working itself out of this take-or-pay situation by negotiations and settlements extending make-up periods under those contracts. (Tr. 36-38) Thus far United has not lost any money paid for gas not taken. (Tr. 38) Continental submits that this evidence is irrelevant and immaterial, and inadmissible in support of the Examiner's findings. At best it is inconclusive and not probative of United's supply requirements over the next sixteen years. Certainly there is no showing of United's reserve life in-

dex or long-term supply situation; the take-or-pay problem United has faced under other contracts United admits is temporary. (Tr. 40) Moreover, since takes from Johnson Bayou would be on a ratable basis under Continental's rate schedule, with no take-or-pay provision, these takes in any event could not increase United's existing obligations under other contracts which do contain such provisions. (Tr. 40)

Since United's need for gas and adequacy or inadequacy of supply are immaterial in this proceeding, and since the

record does not support the Examiner's findings on these points, the findings should be set aside.

Conclusion

For the foregoing reasons, Continental's exceptions to the Examiner's decision should be granted and the decision and findings therein set aside. The Commission should order United to continue operaation of the facilities for taking gas in Johnson Bayou Fields and continue to take such gas in accordance with Continental's effective rate schedule.

/s/ Tom Burton

Respectfully submitted,

/s/ Tom Burton
Bruce R. Merrill
Tom Burton
Attorneys for
Continental Oil Company
P.O. Box 2197
Houston 1, Texas

Dated November 14, 1963

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CERTIFICATE OF SERVICE

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Docketed Nov. 18, 1963

Motion Requesting Opportunity to Present Oral Argument

Now comes CONTINENTAL OIL COMPANY, Petitioner in the above proceedings, pursuant to Section 1.31(d)(2) of the Commission's Rules of Practice and Procedure, and respectfully moves the Commission for opportunity to present oral argument before the Commission in the above proceedings. In support of this motion, Continental would show that exceptions have been filed to the decision of the Presiding Examiner issued October 28, 1963, and that the matter is before the Commission for consideration. This case involves a decision of first impression, presenting fundamental considerations of construction of the Natural Gas Act with respect to the obligation of a pipeline to take gas committed to the requirements of public convenience and necessity, and the applicability of Section 7(b) of the Act with respect to the pipeline's cessation of the purchase and take of gas without first having applied for and obtained permission and approval of the Commission

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for abandonment pursuant to Section 7(b). The importance of this case to the industry and the fundamental issues of law involved require that the case be fully presented before the Commission. To this end, Continental submits that

oral argument will be an advantage in the presentation of the case to the Commission.

/s/ Tom Burton

Respectfully submitted,

/s/ Tom Burton
Tom Burton, Attorney for
CONTINENTAL OIL COMPANY

Houston, Texas
November 15, 1963

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STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared TOM BURTON, known to me to be the person who signed the foregoing Motion, and, being by me duly sworn, on oath deposes and says that the facts contained therein are true to the best of his knowledge, information and belief.

/s/ Tom Burton
/s/ Tom Burton

SWORN TO AND SUBSCRIBED BEFORE ME, this 15th day of November, 1963.

/s/ Hallie R. Madiley
Notary Public in and for
Harris County, Texas

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CERTIFICATE OF SERVICE

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Docketed Nov. 18, 1963

BEFORE THE
FEDERAL POWER COMMISSION

Continental Oil Company Docket No. CI63-979

Exceptions of the Commission's Staff to the Examiner's Decision

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The Commission's staff, acting pursuant to section 1.31 of the Commission's Rules of Practice and Procedure, files herewith exceptions to the decision of the presiding examiner issued October 28, 1963 in this case.

EXCEPTION No. 1

The staff excepts to the conclusion stated on page 7 of the decision that:

"No service has been abandoned by United," and to the findings and conclusions stated on page 8, as follows:

> United Gas Pipe Line Company's supply of natural gas is adequate to meet the demands for service off its system, and it has not abandoned any facilities or service by means thereof, within the meaning of Section 7(b) of the Natural Gas Act.

In lieu thereof the staff proposes the following finding:

> United Gas Pipe Line Company abandoned jurisdictional facilities and service rendered by means thereof within the meaning of section 7(b) of the Natural Gas Act.

If the issue in this case were whether United should be permitted to abandon a purchase of gas from Continental, the examiner's finding that United's supply of natural gas is adequate to meet the demand for service

off its system might be germane, although we would question the sufficiency of the record to support it; but since that issue is not involved, that finding is irrelevant and, therefore, redundant.

This case raises for the first time the question of whether a natural gas company must apply for and obtain the permission of the Federal Power Commission before discontinuing the operation of facilities used to transport natural gas as an incident to the purchase of natural gas which is thereafter transported and sold in interstate commerce for resale. It comes before the Commission on the petition of Continental Oil Company, Houston, Texas requesting that the Commission issue an order directing United Gas Pipe Line Company (United), Shreveport, Louisiana, to show cause why it should not be required to continue to take deliveries of natural gas produced by Continental in the Johnson Bayou field, Cameron Parish, Louisiana, under Continental's FPC gas rate schedule No. 115 as supplemented, and order United to take such gas pending action on the order to show cause.

The factual background of the case is given in the staff's brief at page 3-7 and those pages are hereby incorporated herein by reference in order to avoid unnecessary repitition.

The issue involved in the case is clearly stated in the Commission's show cause order issued therein on May 1, 1963, as follows:

> Continental's petition presents the question of whether the Natural Gas Act and the Commission's Rules and Regulations thereunder require United to apply for and obtain the Commission's permission and approval before ceasing the operation of all or any portion of the facilities heretofore utilized to purchase from Continental natural gas produced in the Johnson Bayou field and whether the termination by United of its purchase of gas from Continental constitutes in whole or in part an abandonment of service. We have not heretofore decided a case in which this issue has been presented.

The Commission ordered United to appear and show cause, if any there be,

> * * * why it should not be required to apply for an obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from the Continental Oil Company from Johnson Bayou field, Cameron Paris Louisiana.

It will be noticed that the Commission did not order United to show cause, as requested by Continental, why it should not be required to take deliveries of Johnson Bayou gas from Continental, but instead, focused on the question of whether United is required by law *to apply for and obtain the Commission's permission* before ceasing the operation of facilities used to purchase such gas.

Since this is not an abandonment proceeding but only a proceeding to determine whether, under the facts in evidence, an abandonment proceeding is necessary, the question of the adequacy of United's supply of natural gas is not material and we submit that the examiner's finding on that point should be stricken.

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It is the position of the Commission's staff that (1) the Natural Gas Act (Act) forbids United to cease the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental from the Johnson Bayou field without first obtaining the permission and approval of the Federal Power Commission and (2) United has not shown cause why it should not be required to apply for and obtain such permission and approval before ceasing such operation.

The examiner's conclusion that United "has not abandoned any facilities or service by means thereof, within the meaning of Section 7(b) of the Natural Gas Act" goes to the heart of the case. The staff disagrees with such conclusion. We submit that the evidence shows conclusively that United *has* abandoned jurisdictional facilities *and* jurisdictional service rendered by means thereof, within the meaning of section 7 (b) of the Act.

Let us look first at the facilities which United abandoned.

There are two gas well completions on Continental's lease in the Johnson Bayou field (T. 89, Ex. 1) and the gas from both of them was sold to United (T. 90). In order to effect the sale and delivery of the gas to United, Continental constructed, owned and operated approximately 4,400 feet of 2½-inch flow line (T. 103), two separators near well No. 1 and a battery of storage tanks near the separators (T. 114-115, Ex. 1). In order to effect the purchase and receipt into its Mud Lake line of the gas from Continental, United constructed, owned and operated

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55 feet of 4-inch pipeline, a separator and a meter station at an original cost of $6,884.68 (T. 25, 66, 70).

The northern end of United's 4-inch line connects with its Mud Lake transmission line, and there United's separator and meter station are located (Ex. 1, T. 71-72). The southern end connects through a valve (T. 105) with the northern end of Continental's 2½-inch flow line (Ex. 1). That was the delivery point and title to the gas passed at that point from Continental to United (T. 83).

Gas from the wells flowed through Continental's 2½-inch line into United's 4-inch line and then through United's 16-inch Mud Lake line to the Beaumont market area. It was admitted and not disputed that the Johnson Bayou gas was transported in interstate commerce for resale (T. 78). The Mud Lake line, extending westward from the Mud Lake field in southwest Louisiana, was already in place when the Johnson Bayou contract between Continental and United was made (T. 25, 70) and it transports gas purchased by United from Magnolia also (T. 82-83). All of the other said facilities were constructed and operated until January 31, 1963 for the sole purpose of enabling the sale, purchase and delivery of Johnson Bayou gas and they have no other use (T. 67, 68, 72, 107-108). When United on January 31, 1963 ceased purchasing that gas, the wells were shut in (T. 108), the operation of said facilities, other than the Mud Lake line, ceased and they have not been operated since then (T. 72, 103, 108).

United argues in its brief (p. 19) that its action in ceasing the operation of facilities which is formerly operated

to purchase Johnson Bayou gas from Continental and in discontinuing the receipt of such gas does not constitute abandonment of such facilities or of any service rendered by means of them. United tacitly recognized, however, that such cessation of operation and service would constitute abandonment when it said, in its letter of December 17,

1962 to Continental (Item C): ". . . we intend to support your filing with the Federal Power Commission for abandonment of service"; and in its letter of December 20, 1962 (Item D): ". . . United is willing to continue to receive such gas . . . until Continental obtains authority from the Federal Power Commission to abandon service to United." *Whether such cessation constitutes abandonment or does not depend on who files for permission to abandon.*

According to Webster's Third New International Dictionary, Unabridged (1961), abandon means, among other things, "to permit to cease or lapse," "to desist from using," "ceasing to operate often." All of those meanings describe United's action with respect to the 4-inch pipeline, separator and meter which it formerly used to receive Johnson Bayou gas from Continental and deliver it into United's Mud Lake pipeline. The first two of these meanings apply also to the services formerly rendered by those facilities.

United action's in ceasing operation of its facilities constitutes abandonment according to judicial interpretation also. In *Smith, Trustee* v. *Hoboken Railroad, Warehouse and Steamship Connecting Co.*, 328, U.S. 123, 130 (1946), the Supreme Court held that *discontinuance of operations* by a trustee in proceedings for reorganization of a railroad in abandonment of

operations of a carrier within the meaning of section 1 (18) of the Interstate Commerce Act, after which section 7(b) of the Natural Gas Act was patterned, which provided that no carirer by railroad shall abandon all or any portion of a line of railroad, or the operation thereof, without a certificate from the Interstate Commerce Commission.

In *Thompson, Trustee* v. *Mexican Railway Co.*, 328 U.S. 134, 148 (1946), the Supreme Court said that, despite the

termination of a trackage agreement, the *operations* of a railroad *may not be discontinued* until a certificate of abandonment is obtained.

In re *Boston Terminal Co.*, 71 F. Supp. 472, 473, 474 (1947), the District Court, D. Massachusetts, said that under the doctrine of the *Smith* and *Thompson cases, supra,* any *discontinuance of operations* by the party presently operating seems to be an abandonment, even though the discontinuance were forced by foreclosure proceedings.

In *Meyers* v. *Jay Street Connecting Railroad,* 259, F. 2d 253, 535 (CA 2) (1958) the court held that, under section 1 (18) of the Interstate Commerce Act, the cessation of service by a railroad was abandonment with "no distinction between discontinuing service permanently and suspending it indifinitely."

There appears no room for doubt, therefore, that, when United ceased operating its 4-inch pipeline, separator and meter it abandoned them and the services rendered by them; and it also rendered inutile Continental's facilties. That the buyer instead of the seller caused the cessation of operation of facilities in this instance does not make

United's action any less illegal. In *Smith* v. *Hoboken Railroad Co.* (supra) the Court held that the lessor of a rail line as well as the lessee has the standing to the invoke section 1 (18) of the Interstate Commerce Act on the question of abandonment (328 U.S. 130). It follows that United as well as Continental has standing to invoke section 7 (b) of the Natural Gas Act and is under no less obligation to do so before ceasing the operation of facilities.

On page 8 of his decision the examiner states that: "United facilities are still in place and can be operated at any time.": That fact does not preclude abandonment,

however. Facilities can be, and in this case were, abandoned "in place." Removal of facilities is not necessary to abandonment and the application of such a test is unrealistically narrow."

The facilities which United abondoned were subject to the Commission's jurisdiction and, therefore, United could not lawfully abandon them without first obtaining the Commission's permission and approval. Those facilities were used (1) to transport natural gas in interstate commerce and (2) to effect the sale in interstate commeree of natural gas for resale, both of which activities are within the jurisdictional ambit of section 1 (b) of the Act.[1] The application of section 7 (b) is as broad as the jurisdiction of

the Commission under section - (b). *Argo Oil Corporation et al.*, 15 FPC 622, 625 (1955); *Federal Power Commission* v. *J. M. Huber Corporation* 133 F. Supp. 479, 487 (USDC D. New Jersey, 1955). Therefore, those facilties are within the Commission's jurisdiction by section (7) of the Act which reguulates the construction of facilities which will be used in jurisdictional activities.[2] *J. M. Huber Corpora-*

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[1] Section 1 (b). The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)]

[2] Section 7 (c). No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sales of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.

tion v. *Federal Power Commissoin,* 236 F. 2d 550, 556, cert. denied 352 U.S. 971.

By the time the gas from Continental's separators entered Continental's 2½-inch pipe to begin its northward journey to the Mud Lake transmission pipeline, production and gathering had been completed, the gas being transported in interstate commerce and such transportation continued until the gas left the Mud Lake line. *Phillips Petroleum Co.* v *Wisconsin,* 347 U.S. 672, 675, 678-680; *Saturn Oil & Gas Company* v. *Federal Power Commission* 250 F. 2d 61, 64, (CA10) certiorari denied 355 U.S. 956. It is not necessary to pinpoint the exact location at which production and gathering of the gas was ended and transportation in interstate commerce was begun because that is not an issue in this case. It is sufficient to note that before reaching the delivery point the gas was flowing through facilities which were under the Commission's juris-

diction under section 7 (c) of the Act, *Continental Oil Company* v. *Federal Power Commission,* 266 F. 2d 208, 211-213, 221 (CA5), certiorari denied 361 U.S. 827; and its movement through such facilities was continued after delivery to United. *United Gas Pipe Line Company* 3 FPC 3, 8; *Interstate Natural Gas Co.* v *Federal Power Commission,* 331 U.S. 682, 684-691.

While the transportation of gas in interstate commerce is sufficient in itself to give the Commission jurisdiction over the facilities which United abandoned, such jurisdiction arises also because the facilities were used to make sales in interstate commerce of natural gas for resale. Continental sold and delivered its Johnson Bayou gas to United which then transported it from Louisiana to Texas where some of it was sold to distributors for resale. Such transactions were (1) in interstate commerce and (2) they

were sales of natural gas for resale for ultimate public consumption. *Argo Oil Corporation, et al.,* 15 FPC 601, 612-613, 618-619, 623-624 (1956); *Saturn Oil & Gas Company, Inc.,* 16 FPC 461, 462-463, 465 (1956); *Interstate Natural Gas Co., Inc.* v. *Federal Power Commission,* 331 U.S. 682, 686-688 (1947).

The power to control the sale of gas, which the Commission has under sections 1 (b) and 7 (a)(c) and (e) of the Act, includes power over facilities necessary to make that sale. *Argo Oil Corporation, et al.,* 15 FPC 601, 624; *Federal Power Commission* v. *J. M. Huber Corpration,* 133, F. Supp. 479, 487.

United's facilities as well as Continental's facilities were used in making the sales in interstate commerce. United's

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55 feet of 4-inch pipeline, separator and meter were sales facilities equally with Continental's 2½-inch flow line, and no party has suggested otherwise. The fact that some of the facilities which were involved in effecting the transportation and sale of the gas were owned by Continental and some by United does not affect the Commission's jurisdiction over *all* of such facilities. *Argo Oil Corporation, et al.,* 15 FPC 601, 619. There can be no sale unless the seller's and the buyer's facilities connect, and the true test of jurisdiction is the use and service of the facilities. *J. M. Huber Corporation* v *Federal Power Commission,* 236 F. 2d 550, 555, 557 (CA3)(1956). Such facilities, being jurisdictional, cannot be lawfully abandoned without the Commission's permission.

The fact that the facilities heretofore operated by United to purchase Johnson Bayou gas from Continental were subject to the jurisdiction of the Commission is all that is necessary to bring them within the scope of section

7(b) and require United to obtain the Commission's permission before abandoning them.

There is a further reason, however, why United is subject to that requirement, namely that when United ceased the operation of those facilities, it abandoned the services rendered by them which also is proscribed by section 7 (b). Those services included the transportation of natural gas in interstate commerce and effectuating the sale and purchase in interstate commerce of natural gas for resale for public consumption. The abandonment of facilities and services was the inevitable result of United's action inceasing to purchase Johnson Bayou gas from Continental.

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The sale of Johnson Bayou gas by Continental and its purchase by United comprised a single transaction which consisted of the transfer, for a consideration, of title to the gas from seller to buyer. *Butler* v. *Thomson et al.*, 92 U.S. 412, 415 (1875). For every sale there must be a purchase and for every seller there must be a buyer. *Ibidem; Commissioner of Internal Revenue* v. *Freihofer,* 102 F. 2d 787, 790 (CA3) (1939). Like the two sides of a coin, there cannot be one without the other. "Sale" and "purchase" are but different names describing the same transaction, one from the standpoint of the seller and the other from the standpoint of the buyer.

That being the case, the examiner's observation on page 8 of his decision that *"The act is silent as to any requirement that the purchaser of gas secure a certificate"* has no apparent pertinence. When the Commission auhtorizes a sale of gas it necessarily authorizes its purchase. There is no need to authorize the same thing twice by requiring the purchaser to secure a certificate.

Since a sale and a purchase are but one and the same transaction, it follows that facilities which effectuate a sale of gas effectuate also its purchase and vice versa. Continental's 2½-inch pipeline, which effectuated the sale of gas by Continental, effectuated also its purchase by United since the gas could not have been received in United's pipe had it not been delivered by Contenental's pipe. United's 4-inch pipeline, which effectuated the purchase of gas by United, effectuated also its sale by Continental since the gas could not have been delivered by

Continental's pipe if there had not been a receptacle for it at the delivery point.

From those facts it follows that whatever statutory restrictions apply to the abandonment of a sale of gas apply also to abandonment of its purchase. Since the service of sale and purchase of Johnson Bayou gas was rendered by means of the same facilities which were subject to the Commission's jurisdiction, both the sale by Continental and the purchase by United are subject to the restrictions imposed by section 7(b) of the Act, and neither the sale nor the purchase can be lawfully abandoned without the prior permission of the Commission obtained in compliance with the Act.

It is now settled beyond question that a natural gas company cannot abandon at will a sale of natural gas which is subject to the jurisdiction of the Commission. *J. M. Huber Corporation v. Federal Power Commission*, 236 F.2d 550, certiorari denied 352 U.S. 971. No good reason appears why unauthorized abandonment of a jurisdictional service should be prohibited when the service is called a sale but permitted when it is called a purchase. The applicability of section 7 (b) does not depend upon the term by which the sale-purchase transaction is des-

ignated. No good reason appears why a natural gas company should not be under the same restraint in this respect as a gas purchaser as it is as a gas seller.

The same results ensue regardless of whether the sale-purchase transaction is stopped by the seller or by the buyer. In this case, United's cessation of gas purchases resulted in idling the same facilities as would have been

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idled if Continental had initiated the shutdown by ceasing sales, and the effects on gas consumers are also the same.

It is not material, insofar as a natural gas company's duty to comply with the Act is concerned, whether a cessation of gas purchases does or, as claimed by United in this case, does not deprive gas consumers of adequate service. The Congress charged the Commission with the responsibility of making that determination and manifested clearly its intent that natural gas companies be denied that privilege. In *Panhandle Eastern Pipe Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507, 520 (1947) the Supreme Court, with reference to the Natural Gas Act, said:

> We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states • • •

The intended role of this Commission and the effectiveness of the regulatory scheme would be seriously impaired if natural gas companies were left free to abandon at will, subject only to contractual provisions, purchases of natural gas which is sold in interstate commerce for resale. Such freedom of action which would permit a natural gas company to abandon gas purchases whenever, as in this case, the Commission approves a price which the company dis-

approves would impair the Commission's ability to regulate rates and exercise its other powers under section 4 and 5 of the Act. It would also be an instrument of coercion which natural gas pipeline companies could exercise gas sellers and producers adversely to the public's interest. It would also provide a means by which a gas seller,

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who desires to abandon a jurisdictional sale, could circumvent the requirements of section 7(b) if it could persuade its customer to cease purchasing.

Regarding the staff's contention that the term "service" as used in section 7 (b) of the Act includes the purchase of gas, the examiner pointed out (Decision p. 7) that the Solicitor General presented a different view to the Supreme Court in his brief in *Sunray Oil Co.* v *Federal Power Commission,* 364, U.S. 137. The Solicitor's view must be read in context and when so read we believe it is not inconsistent with our view. Be that as it may, however, what the Supreme Court said in the *Sunray* case is more important to us than what the Solicitor said, and the Court said (at 364 U.S. 156) that once gas is dedicated to interstate use, ". . . there can be no withdrawal of that supply from continued interstate movement without Commission approval." The Court made no distinction between withdrawal by the seller and withdrawal by the purchaser.

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The staff's position and conclusions are supported by the intention of Congress in enacting the Natural Gas Act as revealed in legislative hearings preceding enactment and by judicial interpretation.

The Natural Gas Act was enacted primarily for the benefit of consumers of natural gas, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610; *Phil-*

lips Petroleum Co. v *Wisconsin* 347 U.S. 672, 685; *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 581. One of the benefits which the Act was designed to insure was continuity of gas service to consumers and to that end the Act provides in section 7 (b) that:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. (62 Stat. 824 (1938); 15 U.S.C. 717f (b))

Without § 7 (b) a serious gap would have been left in the regulatory scheme of the Act and the Congress made clear its intention that no such gap exist. No such provision was contained in H. R. 11662, (74th Congress 2d session), which was a bill to regulate the transportation and sale of natural gas in interstate commerce and a predecessor of H. R. 6586

(175th Congress, 3d session) which became the Natural Gas Act, approved June 21, 1938, (52 Stat. 821-833; 15 U.S.C. § 717-717w). The need for an explicit provision on this matter was suggested by John E. Benton, General Solicitor, National Association of Railroad and Utilities Commissioners, in a statement during the hearing on H.R. 11662 before a subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 2d session, in April 1936. Mr. Benton said (H. R. 11662, Hearing p. 92):

> Presumably it is the intent of the bill that service once extended shall not be withdrawn without the con-

sent of the Commission. We suggest that this intention should be made clear by explicit language. We will present an amendment covering that point.

There should not be any possibility of a company having the chance to claim, and to litigate the claim, that if it does not like a rate which has been fixed by the Federal tribunal, it can discontinue service.

Mr. Benton proposed that the bill be amended by adding to section 7 a new paragraph (b) as follows (Hearing p. 98):

No gas company, which is supplying gas to a public utility company, engaged in distributing such gas to the public, shall discontinue service to such public utility company without first obtaining from the Commission a certificate that public convenience and necessity permit such abandonment.

The proposed amendment was patterned after a similar provision of the Interstate Commerce Act as added by the Transportation Act of 1920, 41 Stat. 477, 49 U.S.C. section 1 (18), prohibiting the abandonment of all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Interstate Commerce

Commission a certificate that the public convenience and necessity permit such abandonment.

Mr. Benton's suggested prohibition against unauthorized abandonment of service was expanded in scope and adopted. In H.R. 4008 (75th Congress, 1st session), a bill introduced after H.R. 11662 to regulate the transportation and sale of natural gas in interstate commerce, section 7(b) appeared in language identical to that in the present Act. In the hearing on H.R. 4008 before the House Committee on Interstate and Foreign Commerce in March

1937, William A. Dougherty, a New York attorney, who said he was connected with the management of several natural gas pipeline companies, proposed that the effect of section 7(b) be limited by adding thereto a proviso as follows: (H.R. 4008 Hearing p. 127):

> Provided, however, that facilities may be abandoned without obtaining such permission, approval, or finding, if service is not thereby impaired of if substitute facilities will be installed.

The proposed amendment was rejected, thereby affirming the congressional intent that the permission and approval of the Commission are prerequisite to the abandonment of *any and all facilities, without exception,* which are subject to its jurisdiction or of any service rendered by means of such facilities.

The purpose of section 7(b) of the Act to insure continuity of gas service to consumers, and thereby avoid a gap in the regulatory scheme of the Act, would be thwarted if United or any other natural gas company, on its own volition and without giving the Commission an oppor-

tunity to act on the question of whether the discontinuance of service would be adverse to the public interest, could stop or diminish the flow of gas from well mouth to burner tip by simply ceasing to purchase and to accept deliveries of gas.

United argues and stresses the point that its cessation of the purchase and receipt of Johnson Bayou gas from Continental has not caused any interruption of service to its customers and that, despite such cessation, it has continued to serve its customers' requirements. While that contention might be a matter for consideration in an abandonment proceeding as bearing upon the question of whether

the public convenience or necessity permit the abandonment by United of its purchase of Johnson Bayou gas, it is not material in this case because this is not an abandonment proceeding. The question to be decided herein is whether the law requires that United submit to the Commission for its determination the question of whether the public interest permits United to abandon such purchase or whether United can make that determination for itself, or even abandon a gas purchase irrespective of the effect upon the public interest.

If United and other natural gas companies were permitted to abandon natural gas purchases without applying to the Commission for permission, the Commission would be denied the opportunity of protecting the public interest in this important area and regulation would be in the hands of the regulated. The self interest of natural gas companies does not always coincide with the public interest. Even if United does not need Johnson Bayou gas now and can continue to serve its customers' requirements with-

out it, on some other occasion it, or some other natural gas company, might see fit to discontinue a purchase of gas to the detriment of gas consumers if it were legal to do so without seeking the Commission's permission. As already pointed out, however, the Congress rejected the amendment to section 7 (b) which was proposed in the hearing on H. R. 4008 which would have permitted United to do just what it now seeks to do, namely to adandon jurisdictional facilities upon a determination *by the abandoner* that service would not be impaired thereby. In so doing the Congress made it clear that the Commission is the guardian of the public interest in matters of abandonment of natural gas service and facilities used in rendering that service.

The intention of the Congress to insure continuity of gas service is further manifested in the broad sweep of section 7(b). The language of that section is comprehensive in its scope and makes no distinction between sellers of gas and buyers of gas. It says that: *"No natural-gas company shall abandon . . ."* jurisdiction facilities without the Commission's permission. (Emphasis supplied). The prohibitory mandate of that section is directed to *all* natural gas companies as defined in section 2 (6) of the Act, i.e. to all individuals and corporations:

> engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

The evidence in this case shows conclusively, and it is uncontraverted that United is a corporate engaged in the transportation of natural gas in interstate commerce and also in the sale in interstate commerce of such gas for

resale and, therefore, it is within the restriction imposed by section 7 (b).

Moreover, while subsections 7 (a), (c) and (e) of the Act speak specifically of selling or the sale of natural gas, subsection 7 (b) is not so limited but, instead, it embraces broadly *". . . any service rendered . . . "* by means of jurisdictional facilities. (Emphasis supplied). The purchase, receipt, and delivery of gas, as well as its sale, are among the services that are rendered by such facilities and which may not be lawfully abandoned without the Commission's permission.

EXCEPTION No. 2

The staff excerpts to the examiner's findings and conclusion as stated on page 8 of his decision, as follows:

> It has not been shown that permission and approval of the Commission is required by United Gas Pipe

Line Company to cease the purchase of natural gas tendered by Continental from the Johnson Bayou Field, Cameron Parish, Louisiana.

In lieu thereof the staff proposes the following finding:

United has not shown why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental Oil Company from Johnson Bayou field, Cameron Parish, Louisiana.

The examiner's finding implies that somebody has the burden of proving that the Commission's permission *is*

required by United to cease the purchase of Johnson Bayou gas from Continental. That is not the case however. The Commission's order puts the burden squarely on United to show cause *why it should not be required* to apply for and obtain the Commission's permission and approval prior to abandonment and the finding should reflect whether or not United has met its burden thus imposed. The examiner's finding is irrelevant to the Commission's order in the case and should be stricken. The examiner's order on page 8 should be changed to effectuate the staff's proposed finding.

Respectfully submitted

/s/ C. Louis Knight
C. Louis Knight
Commission Staff Counsel

Washington, D. C.
November 18, 1963.

(457)

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CERTIFICATE OF SERVICE

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[Docketed Nov. 26, 1963]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of
Continental Oil Company — Docket No. CI63-979

Reply By United Gas Pipe Line Company to Exceptions By Continental Oil Company and the Commission's Staff to Decision of Presiding Examiner

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Comes now, UNITED GAS PIPE LINE COMPANY (United) and pursuant to Section 1.31 of the Commission's Rules of Practice and Procedure files this reply to the exceptions taken by Continental Oil Company (Continental) and the Commission's Staff to the initial decision of the Presiding Examiner issued October 28, 1963.

I.

In their exceptions neither Continental nor the Staff argues anything new or different from that which each argued in its briefs filed before the Examiner rendered his decision. United will, therefore, not answer again the same arguments it answered in prior briefs. United continues to rely upon its briefs filed before the Examiner issued his decision.

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II.

For the sake of emphasis United will, however, repeat the central argument it has urged throughout this pro-

ceeding, as follows. United has discontinued none of its sales to any of its customers and its Johnson Bayou facilities remain in place available for use to transport gas from the Johnson Bayou Field. Continental, not United, cancelled the contract containing obligations to sell and purchase Johnson Bayou Field gas and Continental formulated exparte, new terms and conditions, including a higher price for its Johnson Bayou Field gas, and Continental unilaterally filed those new terms and conditions with the Federal Power Commission. Under those circumstances United has done nothing more than exercise the right recognzied in *Sunray Mid-Continent Oil* v *Federal Power Commission,* 364 U.S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392; *United Gas Pipe Line Company* v *Mobile Gas Corporation,* 350 U.S. 332, 100 L. ed. 373 and *United Gas Pipe Line Companp* v *Memphis Light, Gas & Water Division,* 358 U.S. 103, 3 L. ed. 2d 153, 79 S. Ct. 194, to buy or not buy under the unilaterally imposed ex parte terms.

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If it be that Continental has the right unilaterally to file its ex parte terms and conditions, then the Supreme Court has made it clear that Continental is obligated to deliver gas on *United request,* unless Continental can justify an abondenment. And United has requested no gas of Continental. The controlling language from the *Sunray* (supra) decision is as follows:

> "It is apparent that the Commission's order in no way violates the integrity of petitioner's contract with United. During its term, both parties are bound by it to the same extent as any members of this regulated industry. *When it expires, petitioner, to be sure, will be under no obligation to continue to deliver gas to United on the latter's request unless it can justify an abandonment before the Commission;* but we do not see how this in any way disturbs the integrity of the contract during its term. The obligation that peti-

tioner will be under after the contract term will not be one imposed by contract but by the Act. It will be free then, as it was not free during the contract term under the contract here in question, to make rate changes under § 4 with United's consent. *It is said that petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it.* But United, subject to the Act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under Mobile, it may be discovered that each side has its bargaining strength." (Emphasis ours)

Continental and Commission Staff argue that the language underlined above, that the producer must "deliver

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gas to United on the latter's request" and that the producer "must supply gas then to United without a corresponding obligation on United to take it" are meaningless to the decision in *Sunray* and should be ignored by the Commission. Continental argues that had the Supreme Court given United obligations consideration, it would not have used the language it did but would have used language which, in the circumstances presented here, would require United and the Federal Power Commission to look to the Louisiana Common Purchaser statute in determining how much gas United must buy. In the same vein, Staff argues the language would have placed on United the duty to buy the amount required by Continental's ex parte terms filed unilaterally with the Commission.

But no warrant exists in the Natural Gas Act for the positions taken by Continental or the Staff and they are contrary to *Sunray, Mobile* and *Memphis.*

Sunray created no new or different rights in a seller of natural gas under the Natural Gas Act. Those rights with respect to rates were clearly defined in *United Gas Pipe*

Line Company v. *Mobile Gas Corporation*, 350 U.S. 332, 100 L. ed. 373, where the court said:

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> "• • • The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: *to establish ex parte, and change at will, the rates offered to prospective customers;* or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." (Emphasis ours)

United has certainly been a "particular customer" of Continental buying under terms fixed by contract, and United believes if it is yet bound to buy Continental's gas that the terms of the purchase cannot be unilaterally changed by Continental. But conceding, arguendo, Continental's right here to cancel its contractural relationship with United, there then remains for Continental only the alternative it would have possessed in the absence of the act and made plain in *Mobile*. Having chosen to cancel the contract and unilaterally to establish an ex parte relationship, Continental can have no greater right than to "offer" its gas to United as a "prospective customer" and to change at will the rates "offered."

The Supreme Court's holding in *Mobile* was repeated literally and emphasized in *United Gas Pipe Line Company* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 3 L. ed. 2d 153, 19 S. Ct. 194. The Supreme Court said

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in both *Mobile* and *Memphis* that under an ex parte arrangement, the seller offers gas to the buyer as a prospective customer. Those decisions are vital and controlling here. As a seller without the limitations of a contract fixing its rates, Continental may enjoy the right to change its rate at will, but it can do no more than offer its gas to

United as the buyer. If United needs and accepts it, then it must pay the price fixed by the seller, but the seller cannot impose the terms and at the same time force the buyer to buy.

The holding in *Mobile* and *Memphis* is consistent with the holding in *Sunray,* and what the court said in *Sunray* cannot be accepted in part and rejected in part. The producers' right to raise its rates when freed from contractural prohibition from doing so, necessarily presupposes a freedom in the buyer to buy or refrain from buying. The Supreme Court of the United States has said so three times, in *Sunray, Mobile* and *Memphis,* and Commissioner Connole recognized this to be the law in his concurring opinion in the decision *P. R. Rutherford, et al,* referred to

by the Presiding Examiner.

The Examiner's decision is correct and should be affirmed.

Respectfully submitted,

/s/ Vernon W. Woods
Vernon W. Woods, Attorney for
United Gas Pipe Line Company

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CERTIFICATE OF SERVICE

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[Docketed Dec. 3, 1963]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Continental Oil Company Docket No. CI63-979

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Notice Fixing Oral Argument

(December 3, 1963)

Upon consideration of the motion filed herein for an opportunity to present oral argument;

Notice is given that an oral argument is hereby scheduled to be held at 10:00 a.m., January 31, 1964, in a hearing room of the Federal Power Commission, on the Examiner's Decision issued October 28, 1963, and the exceptions thereto;

Any party desiring to participate in the oral argument should notify the Secretary on or before January 10, 1964. of the time desired for the presentation of argument.
By direction of the Commission.

/s/ Joseph H. Gutride
Secretary

DC 18

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[Docketed Dec. 6, 1963]

December 5, 1963

Mr. Joseph H. Gutride, Secretary
Federal Power Commission
441 G Street, N.W.
Washington 25, D. C.

Re: Continental Oil Company
Docket No. CI 63-979

Dear Mr. Gutride:

Responding to your Notice Fixing Oral Argument issued December 3, 1963, in the above-referenced docket, please be advised that the undersigned will argue in behalf of Continental Oil Company and that thirty minutes is desired as time for argument. I would expect to divide the time twenty minutes on opening argument and ten minutes on closing argument, should Continental be permitted to open and close. It would be appreciated in this type of case if you would advise who will open and who will close.

Very truly yours,

/s/ Bruce R. Merrill
Counsel

BRM-HRM

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Docketed Dec. 26, 1963

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Continental Oil Company
vs. Docket No. CI63-979
United Gas Pipe Line Company

Notice of Postponement of Oral Argument

(December 26, 1963)

Notice is hereby given that the oral argument now scheduled for January 31, 1964 by notice issued on December 3, 1963 is postponed to 10:00 a.m., February 4, 1964, in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington, D. C.

/s/ Joseph H. Gutride
Secretary

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[Docketed Jan. 6, 1964]

January 2, 1964

Mr. Joseph H. Gutride
Secretary
Federal Power Commission
441 G Street, N.W.
Washington, D. C.

Re: Continental Oil Company
Docket No. CI63-979

Dear Sir:

By order issued December 3, 1963, the Commission directed that parties desiring to participate in the oral argu-

ment, now scheduled for Tuesday, February 4, 1964, advise the Secretary of the time desired for presentation of argument.

Both Continental Oil Company and the Commission's Staff have filed extensive exceptions to the Examiner's decision and presumably each will make an oral argument. Because United Gas Pipe Line Company must present its principal argument and answer both these parties, it asks that it be allowed one hour for oral argument and that it be scheduled after the principal arguments of both Continental and the Staff.

In view of the extend nature of the exceptions filed by Continental and the Staff, United anticipates it will need the full hour requested; however, should it develop at the argument that lesser time is needed, United will readily forego the time not needed.

Yours very truly,

/s/ Vernon W. Woods
Post Office Box 1707
Shreveport, Louisiana
Attorney for United Gas Pipe Line Company

VWW:mml

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[Docketed May 5, 1964]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 426

Continental Oil Company Docket No. CI63-979

Opinion and Order on Show Cause Order

Issued: May 5, 1964
DC 54

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Continental Oil Company Docket No. CI63-979

Opinion No. 426

APPEARANCES

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For United Gas Pipe Line Company
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David Klotz
Willie L. Meadows

For Texas Eastern Transmission Corporation
Jack D. Head
Keith M. Pyburn
Joseph F. Weiler

For the Staff of the Federal Power Commission
C. Louis Knight

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O'CONNOR, Commissioner:

The question presented in this case is whether the cessation of gas purchases with the concomitant non-use of jurisdictional gas purchasing facilities,[1] where there is no present intent to renew such purchases, constitutes an "abondonment" within the scope of Section 7(b) of the Natural Gas Act.[2] If it does, United's action on January 31, 1963, done without the prior approval of this Commission, was in violation of the Natural Gas Act. This is the only question properly before the Commission and the only one we herein decide.

The facts leading to this controversy are not disputed. On Jaunary 22, 1953, Continental Oil Company (Continental) and United Gas Pipe Line Company (United) executed a contract for the sale and purchase of gas from the Johnson Bayou Field in Cameron Parish, Louisiana. The contract provided for a primary term of 10 years, effective as of January 31, 1953. Article XIII gave either party the

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right to terminate the contract at the end of the 10-year term upon 90 days prior written notice to the other party. If neither party terminated at the end of this term, the contract was to continue in effect on an annual term basis until properly terminated. A price of 8.0973 cents per Mcf plus tax reimbursement at 15.025 psia was provided

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[1] The facilities constructed and operated by United fo rthe sole purpose of receiving Continental's Johnson Bayou Field gas are concededly facilities used for the "transportation of natural gas in interstate commerce" within Section 1(b). Inasmuch as the scope of Section 7(b) has been held to be coextensive with that of Section 1(b), these facilities are likewise "subject to the jurisdiction of the Commission" within Section 7(b). *FPC* v. *J.M. Huber Corp.*, 133 F. Supp. 479 (D.N.J. 1955); *Argo Oil Corp., et al.*, 15 FPC 601, 625 (1955).

[2] *Infra* note 4.

until January 31, 1958 at which time it was to escalate to 8.9970 cents per Mcf plus tax reimbursement. Continental filed this contract with the Commission on November 30, 1954 as its FPC Gas Rate Schedule No. 115, and on January 4, 1956 was issued a certificate of public convenience and necessity in Docket No. G-6949.

The Johnson Bayou Field is adjacent to United's 16-inch Mud Lake transmission line which extends westward from Southwest Louisiana into the Beaumont, Texas area. Continental Agreed to deliver its Johnson Bayou Field gas to a central point located adjacent to this previously constructed line. In order to effectuate the delivery, Continental constructed 4,400 feet of 2½-inch line, 2 separators and several storage tanks. For the sole purpose of taking Continental's gas into its line, United constructed a separator, a meter station, 55 feet of 4-inch line and valves at a total cost of $6,884. Once in the line, the gas was transported to the Beaumont area where it was sold both directly to industrial customers and to distributors for resale.

On October 23, 1962 Continental advised United that it had elected to terminate the contract at the end of the primary term. On November 21, however, representatives of Continental met with representatives of United in an attempt by the former to execute a new 20-year contract. Its terms were to have included a base rate of 14 cents per Mcf at 15.025 psia plus a 1.75 cent tax reimbursement for the first five years with a periodic increase of 1 cent for each succeeding five year period. Continental was also to be allowed to increase its rate up to the just and reasonable rate to be set in AR61-2 in the event it exceeded that set by the contract.

On December 17, United rejected Continental's offer but agreed to support Continental in an abandonment proceeding. By letter of December 20, however, United agreed to continue purchases after the expiration of the primary

term on a day-to-day basis at the then effective rate, and on December 26, proffered to Continental a contract which would have effectuated this post-term offer.

On December 28, Continental acknowledged receipt of the December 26 offer, but notified United that it had elected to file for a rate increase. The same day, Continental filed a supplement

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to its FPC Gas Rate Schedule No. 115 providing for a unilateral increase in price to 14 cents per Mcf plus a 1.75 cent tax reimbursement and requested an effective date of January 31, 1963.[8]

Over United's objection of January 18, 1963, the Commission, on January 25, accepted Continental's filing as Supplement No. 7 to become effective on January 31. On January 28, United notified Continental that purchases from the Johnson Bayou Field would cease as of 7:00 a.m., January 31, 1963. On that date United ceased purchases, and has since refused to renew them.

Continental, on February 1, petitioned the Commission to direct United ". . . to show cause why it should not be required to continue to take deliveries of gas produced by Continental in the Johnson Bayou Field, . . ., at the currently filed and effective rate therein provided, and order United to take such gas pending action on the order to show cause." The Commission declined to issue this order but on May 1 directed United to appear and show cause

[8] It has been suggested that if a pipeline needs Commission authority to abandon purchase facilities at the end of the contract period, a producer would be able to file for and collect, subject to refund, a triggering rate until that rate was ultimately determined to be unjust and unreasonable. We do not believe this spectre is real, for such a case the pipeline could be expected to file immediately for an abondonment and, even if the Section 4(e) proceeding could not be completed within the statutory suspension period, the abandonment proceeding would be completed.

". . . why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental Oil Company from Johnson Bayou Field, Cameron Parish, Louisiana." Hearing was initiated June 3, 1963, and on October 28 an initial decision was rendered which dismissed and vacated the Commission's show cause order. On February 4, 1964, oral argument on the dismissal was heard by the Commission.

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United argues first that there has been no abandonment of facilities within 7(b) because they have been neither removed nor disconnected; and second, that there has been no abandonment of service because sales to the ultimate consumer have not been interrupted.[4]

United's first argument overlooks the consequences of dedicating, and placing into operation, natural gas facilities for public use.[5] First, once facilities are placed into operation, justifiable public reliance attaches to their continued operation. Thus, it matters little to the consuming public that these facilities are physically unaltered if their operation has ceased. Secondly, natural gas companies

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[4] Section 7(b), written disjunctively, reads as follows: "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience and necessity permit such abandonment." 52 Stat. 824 (1938) (Emphasis added.)

[5] Although certification usually precedes dedication, it is indisputable that dedication does not depend upon certification. Thus, although United concedes that no certificate was ever applied for, or granted, for the Jhonson Bayou Field purchase facilities (Record, Vol. 3, p. 161) these facilities are nevertheless dedicated to the public use and cannot be abandoned absent a showing under Section 7(b). *J.M. Huber* v. *FPC*, 236 F. 2d 550 (3rd Cir. 1956) *cert. denied* 352 US 971 (1957).

which dedicate their facilities to the public use have the right to receive a fair return on their net investment from the consumer served by these facilities. Correspondingly, the consumer is entitled to the assurance that this Commission will exercise its statutory responsibilities to prevent abuses of this right. Such abuses would undoubtedly occur if natural gas companies, in the exercise of their own discretion, were allowed to cease to utilize fully depreciated facilities prior to the termination of their actual useful life, and subsequently enter into the construction of expensive new facilities. In short, a whole body of public rights and responsibilities arises upon the dedication of such facilities to the public use. These rights cannot be protected nor these responsibilities be acquitted by the individual natural gas companies. Congressional realization of this fact resulted in the enactment of Section 7(b) of the Natural Gas Act.

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Commission precedent makes it abundantly clear that the applicability of this section has never depended upon the act of physical removal. On the contrary, the Commission has consistently held that "abandonment" can occur regardless of whether facilities have been salvaged and removed, left in place,[9] or merely altered beyond the scope

[9] *El Paso Natural Gas Co.*, 27 FPC 30 (1962) (2,118 feet of 3½-inch O.D. pipe); *Manufacturing Light & Heat*, 25 FPC 775 (1961) (2.3 miles of 24-inch line); *Lone Star Gas Co.*, 24 FPC 1088 (1960) (1.95 miles of pipe remain in use as distribution facilities); *Ohio Fuel Co.*, 23 FPC 693 (1960) (1 mile of 2⅜-inch O.D. line, 1.6 miles of 3½-inch O.D. pipe); *Ohio Fuel Gas*, 22 FPC (1959) (2.3 miles of 4½-inch O.D. pipe); *Manufacturers Light & Heat Co.*, 22 FPC 482 (1959) (1.03 miles of 8-inch transmission line); *Manufacturers Light & Heat Co.*, 20 FPC 120 (1958) (4.9 miles of 6 and 8-inch pipe); *Northern Natural Gas Co.*, 17 FPC 906 (1957) (2.3 miles of 2-inch line); *Northern Natural Gas Co.*, 17 FPC 479 (1957) (16.03 miles of 6⅝-inch O.D. pipe); *Ohio Fuel Gas Co.*, 16 FPC 1233 (1956) (2.2 miles of 3½-inch pipe); *Cities Service Gas Co.*, 6 FPC 747 (1947) (abandonment authority conditioned on in-place abandonment of intra city facilities).

of Section 2.55(b) of our General Policy and Interpretation.[7] Further, it is clear to us that the act of disconnection, like the act of removal, cannot be considered determinative of the applicability of Section 7(b), for to do so would limit its scope only to those cases of physical alteration. Our interest goes beyond this. We have a regulatory responsibility to assure that gas once dedicated to the interstate market will continue to be available to that market so long as the public interest demands,[8] and, as the instant proceeding unmistakably reveals, this responsibility cannot be adequately met if we are powerless to assure that facilities certificated to transport this gas will not continue to operate.

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In cases where there has been no physical alteration in jurisdictional facilities, the applicability of Section 7(b) to these facilities must be determined by whether their use has been terminated. In the instant proceedings, United's action on January 31, when read in light of its letters of December 20 and January 28, as well as the oral argument by its counsel,[9] makes it abundantly clear that so long as Continental's Supplement No. 7 remains in effect, United will cease to purchase Continental's Johnson Bayou Field

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[7] Section 2.55(b) excludes from the certification requirement of Section 7(c) facilities which are to replace existing facilities where no reduction in service will result. In instances where the act of replacing does not demand compliance with Section 7(c), *a fortiori* it does not demand compliance with Section 7(b).

[8] *Shell Oil Co.*, 25 FPC 1316, 1320 (1961).

[9] In response to a question from the bench, counsel for United admitted that he couldn't reasonably anticipate whether operation of the Johnson Bayou Field purchase facilities would be renewed. Record, Vol. 3, p. 207. Earlier he stated that ". . . if it gets cold enough and we need this gas we *probably* will [renew operations]." (Emphasis added.) Record, Vol. 3, p. 163. In view of his earlier emphasis on United's prepayment of $22,000,000 worth of South Louisiana gas, this need appears remote. Record, Vol. 3, p. 148.

gas. There is no evidence which indicates that United has other than these intentions. The facts before us do not present a case of mere alteration of use, which pipelines, legitimately varying their purchase patterns, effect daily. What we are faced with is total cessation of use, and we are convinced that by rendering facilities dedicated for use operationally dormant for a period of indefinite duration, United has "abandoned" them within the meaning of Section 7(b) as effectively as if they had been altogether disconnected and removed. As expressly stated in *Willmut Gas & Oil Co.* v. *United Gas Pipe Line*, abandonments can be accomplished by a manipulation of values as well as by a severance of facilities.[10]

In addition, we find United's second argument, that no abandonment of service has occurred because no sales to ultimate consumers have been diminished, to be legally insupportable. First, it attempts to read "service" in Section 7(b) as being co-extensive with "sales" in Sections 7(c) and (e), a reading which was specifically and repeatedly rejected by the Supreme Court in *Sunray Mid-Continent Oil* v. *FPC*.[11] There the whole Court concurred that the "service" rendered by a pipeline includes far more than its sales to distributors.[12] It is clear to us that included in "service" are all the elements upon which these sales depend particularly the maintenance, in an unimpaired condition, of reserves previously dedicated to the interstate market and upon which the pipeline may have relied for certification. Were we to allow pipelines to make, unilaterally, the decision of whether particular gas sources should be abandoned for indeterminate periods, these re-

[10] 12 FPC (1953).

[11] 364 US 137 (1960).

[12] *Id.* at 149-51 (Brennan, J.), 162-65 (Harlan, J. dissenting).

serves could not possibly be protected in a manner commensurate with our responsibility.[13] This follows from the fact that most production fields are shared by numerous producers. Thus, in all but the rarest cases, where one producer is shut-in, drainage results,[14] and the abandoned producer suffers irreparable harm. If the gas was previously dedicated by the pipeline to a particular jurisdictional customer, that customer also suffers irreparable harm by the steady erosion of reserves previously dedicated to his use. Even absent dedication to particular customers, if drainage is to the intrastate market, the interstate market, previously assured of these reserves, becomes permanently deprived of a valuable source. Although the immediate effect of any individual decision might be *de minimis*, the long-range effect of a policy of allowing pipelines to make them would be detrimental. Clearly it would be no answer to say that an abandonment of service occurred only at the time their cumulative effect had exhausted, or substantially endangered, a pipeline's gas supply, because then the Commission would be powerless to remedy it. If we are to assure the continued adequancy of reserves dedicated to the interstate market, the

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[13] This should not be interpreted as tacit approval of a unilateral decision to "partially" abandon, *i.e.*, the unilateral reduction of a pipeline's takes below the minimum either as specified in contracts underlying the original certificate, or determined by applicable state rateable purchase statutes. *E.g.*, Tex. Stat. Ann., tit. 102, art. 6049a §§ 8, 8a; Okla. Stat. Ann., tit. 52, § 240; La. Rev. Stat., tit. 30, §§ 41-46. As we previously made clear in our discussion of facility abandonments, however, therewould be no abandonment of service in the legitimate, temporary variation in purchase patterns.

[14] United presented evidence to show that Continental was the only producer in the Jhonson Bayou Field. Presumably no drainage would be suffered, at present, from other producers, but this factual situation which is by no means typical, could change at any time. Even in the absence of drainage, producers abandoned under such circumstances could present a strong justification under Section 7(b) for allowing severance from their previous purchaser, thus freeing their gas from its interstate dedication.

indefinite cessation of purchases from sources, previously dedicated to that market, must be interpreted as an abandonment of service within Section 7(b).

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United argues further that, even if its action could be characterized as an abandonment, we lack the power to compel pipelines to purchase gas after the termination of gas sales contracts. It relies upon the following Supreme Court language in *Sunray*:

> "It is said that the petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it."[15]

The Court's language does not support United's position. By prefacing with "(it) is said," the Court obviously intended its statement to be read as a paraphrase of counsel's argument, and not as a holding thereon. Further, the Court subsequently made it clear that United, as well as the producer, had obligations under the Act. United's obligations were not specifically demarcated, inasmuch as the Court was primarily concerned with the obligations of producers, but there are no implications that the one reference was intended to be definitive.[16] Moreover, United ignores the thrust of Section 7(b). That section frames the relevant issue, not in terms of whether this Commission has the power to compel continued purchases, but whether the "public convenience and necessity" dictates that pipelines *cease* purchasing. The mandate is clear that absent satisfaction of this test, which cannot be met by mere showing of contract termination, the *status quo* is to continue.

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[15] 364 US 137, 155 (1960).

[16] The particular obligation to which the Court referred ran to United's local distributors.

The absence of power to compel initial purchases does not refute this conclusion, for as we recognized in *Argo Oil Corp., et al.*[17] there is a vast distinction between the power to compel initial actions and the power to compel the continuation of these actions. The reason is obvious: once sales and purchases of gas flowing in interstate commerce begin, the interests of numerous parties become dependent upon their continuation. Consequently it is not within the power of individual natural gas companies to say, absent our approval, when they are to cease. *Argo Oil Corp.* is but a reflection of Congressional recognition of the distinction between the need for regulation of initial acts, and regulation of the cessation of those acts. Regulation of all initial acts was not thought necessary, and thus Congress, upon the enactment of the original Section 7(c), exempted from certification the construction of facilities and the resulting sales where effected to serve previously unserved markets. It was not until 1942 that Section 7(c) was amended to its present form. Since 1938, however, there has never been any question but that our prior approval was a prerequisite for the abandonment

of any jurisdictional facility or any service rendered by that facility.[18] Section 7(b) reads today as it did twenty-six years ago. Given this history, we would be most dere-

[17] 15 FPC 601 (1955).

[18] Congressional insistence upon this Commission having authority over every jurisdictional abandonment, regardless of how *de minimis*, was revealed in the hearing on H.R. 4008, in March of 1937, before the House Committee on Interstate and Foreign Commerce. The following amendment to Section 7(b) was then introduced:

> "*Provided, however*, that facilities may be abandoned without obtaining such permission, approval, or finding, if service is not thereby impaired or if substitute facilities will be installed."

The amendment was rejected.

lict in failing to accord it the strict enforcement for which it was written.

The recent cases of *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*[19] and *Sunray Mid-Continent Oil Co.* v. *FPC*[20] reinforce this conclusion. Both cases recognize that obligations between parties, arising out of contract, may be unilaterally altered upon the termination of the contract. Obligations to the public, however, arise out of dedication to public use, and consequently must remain fixed[21] unless changed in the manner provided for in the Natural Gas Act. The repeated rationale for the latter case is that regardless of contractual termination, there may be times when the public interest demands the continuation of gas sales to the interstate market. In the instant case, Continental was issued a permanent certificate,[22] and thus, under the holding of *Sunray,* could be compelled to continue sales to United even after the termination of their contract. If United's contention were correct, however, the Commission would find itself in the anomalous position of having the power to compel Continental to continue to sell, but not having the power to compel United to continue to purchase. To such paradoxical results we cannot subscribe. Thus, we conclude that if the power to compel the continuation of sales is not to be reduced to mere illusion, the power to compel the continuation of purchases must be its correlative.

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Inasmuch as we conclude that United's action of ceasing to utilize jurisdictional purchase facilities for an indeter-

[19] 350 US 332 (1956).

[20] 364 US 137 (1960).

[21] This same principle was announced in the earlier Commission case of *United Gas Pipe Line,* 3 FPC 3 (1942).

[22] Initial decision, p. 6.

minate period of time constituted an "abandonment" within Section 7(b), we have no alternative but to order United to renew the use of these facilities. Such order is without prejudice to the institution by United of a formal abandonment proceeding. Pending the resolution of such proceeding, however, purchases must be made at Continental's currently effective filed rate, and in volumes consistent with the terms of the previously effective contract.

The minority's fear that our decision will force pipelines to purchase high-priced gas to the consumer's detriment underestimates our power to protect these interests. Thus, increases would always be subject to Commission approval in acquitting its responsibility to fix and maintain just and reasonable rates.

The Commission finds:

(1) United Gas Pipe Line is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of November 10, 1942, 3 FPC 863 (1942).

(2) Continental Oil Company is a "natural-gas company" within the meaning of the Natural Gas Act, and its sales for resale from the Johnson Bayou Field were sales of natural gas in interstate commerce subject to the jurisdiction of this Commission.

(3) The facilities constructed by United for the purpose of purchasing and taking into its line Continental's Johnson Bayou Field gas are facilities used for the "transportation of natural gas in interstate commerce" within Section 1(b) and thus are "subject to the jurisdiction of the Commission" within Section 7(b).

(4) United's act of January 31, 1963, resulting in the complete non-use of jurisdictional purchase facilities for an undetermined period of time constituted an abandon-

ment a facilities within Section 7(b) of the Natural Gas Act, for which authorization, as required by that Section, was not granted by this Commission.

(5) United's act of January 31, 1963, in ceasing to draw upon gas reserves dedicated to the interstate market for an undetermined period of time, constituted an abandonment of service within Section 7(b) of the Natural Gas Act, for which authorization, as required by that Section was not granted by this Commission.

(6) As of January 31, 1963 Continental's effective filed rate tariff for sales to United from the Johnson Bayou Field is that schedule designated as Supplement No. 7 to their FPC Gas Rate Schedule No. 115.

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The Commission orders:

Effective this date, United will renew operation of its Johnson Bayou Field facilities used to purchase gas from Continental. Purchases made by these families will be at the rate specified in Continental's Supplement No. 7 to its FPC Gas Rate Schedule No. 115, in volumes consistent with the terms of the previously executed contract.
By the Commission. Commissioner Woodward dissenting filed a separate statement appended hereto.

/s/ Gordon M. Grant,
(SEAL) Acting Secretary.

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Continental Oil Company Docket No. CI63-979

(Issued May 5, 1964)

WOODWARD, Commissioner, *dissenting:*

The fundamental question in this proceeding is whether the Commission has the power to compel a pipeline com-

pany to continue to operate its facilities for the purpose of purchasing gas it does not currently need under terms and conditions unilaterally imposed by the producer-seller and in the absence of a contractual relationship between it and the seller.

The majority, answering this question in the affirmative, has achieved a unique result; by virtue of this order, the Federal Power Commission has substituted itself for Continental Oil Company (Continental) as the Company's bargaining agent for the sale of Continental's gas. The majority advances neither sound reasons nor adequate authority to show that the Natural Gas Act was intended to give a producer such an advantage over a pipeline company. For the reasons outlined below, I cannot subscribe to an order that accords lawfulness to duress.

Initially, it should be pointed out that the majority's opinion and order is not responsive to the show cause order issued in this proceeding. That order referred to the cessation of "operation" of facilities;[1] even a cursory read-

[1] In issuing this order, the Commission found: "We find it necessary and appropriate in carrying out the provisions of the Natural Gas Act, therefore, that United show cause, as hereinafter ordered, why it should not file with the Commission an application for abandonment authorization pursuant to Section 7(b) of the Natural Gas Act and the Commission's Rules and Regulations thereunder." The Commission ordered: "United Gas Pipeline Company shall appear and show cause, if any there be, at the hearing directed in paragraph (B) hereof, why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental Oil Company from Johnson Bayou Field, Cameron Parish, Louisiana." As the examiner notes on page 2 of his initial decision, "The Commission has not issued any substantive rules as to general policy and interpretations relating to abandonment under the Natural Gas Act."

ing of Section 7(b)[2] discloses that 7(b) requires approval only for abandonment of facilities or service and not, as we have here, for approval of "changes" in the operation of facilities which remain in place ready for use at any time. The word "operation" cannot be found in Section 7(b) of the statute.[3] In short, Section 7(b) is not applicable in the instant proceeding.

No section of the Natural Gas Act should be construed to confer upon the Commission powers denied it by other sections of the Act. *Panhandle Eastern Pipeline Company* v. *Federal Power Commission*, 204 F. 2d 675. Here, the Commission cannot construe the provisions of Section 7(b) relating to abandonment of facilities as empowering it to compel a purchase of gas in contravention to the express limitation imposed upon its jurisdiction by Section 1(b) of the Act. Thus, the majority errs in finding ". . . that by rendering facilities dedicated for use operationally dormant for a period of indefinite duration, United has 'abandoned' them within the meaning of Section 7(b) . . ."[4]

The term "abandonment," as it has been judicially construed, necessarily connotes an intention to *permanently*

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[2] Section 7(b) provides: "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience and necessity permit such abandonment."

[3] Where Congress, in Section 7, intended regulation over the "operation" of facilities, it so stated with clarity and precision. *cf.* subsections (c) and (e).

[4] *Mimeo* P. 6.

discontinue use[5] of facilities; mere cessation of operation is not sufficient to constitute abandonment. Staff counsel correctly recognized this vital distinction during oral argument in this case.[6]

Mr. Knight: I would say in all cases, Mr. Chairman, whether or not there is an abandonment would have to be decided in the light of all facts and circumstances of the case.

Chairman Swidler: If you say that, the mere cessation is not enough.

Mr. Knight: That is right.

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Chairman Swidler: It requires more.

Mr. Knight: You have to have more.

Chairman Swidler: It requires intention.

Mr. Knight: That is right.

The record is replete with evidence which establishes beyond doubt that United, at no time, has intended to abandon these facilities. During oral argument counsel for United stated, "We did offer them a contract and *the offer is still outstanding.*"[7] Further, "If we in this bargaining process here with Continental, if it takes us a year to get this matter settled before we get back this gas at either 14¢ or 10¢, whatever it is, we haven't abandoned those facilities, they are still there, and if we need this gas tomorrow at Beaumont, United will take it."[8] In other words, the reserves are still in place and they are still available to United if United wishes to take them. All

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[5] Emphasis supplied throughout this statement unless otherwise indicated.

[6] Tr. P-194.

[7] Tr. P-203.

[8] Tr. P-205.

facilities remain in place and all customers of United are being adequately served.

The majority's findings, although couched in vagaries, simply boil down to this; a willingness to take gas at a price of 10¢ but not 14¢ amounts to total abandonment. There is no legal or factual support in the record for such a contention. United stands willing to continue the operation of the facilities and performance of the obligation it undertook initially to perform. Moreover, United has indicated that it will take Continental's gas, even if it must pay the higher price, if the gas should be needed to continue its service obligations to its customers. These facts are uncontradicted in the record.

There is no authority under the Natural Gas Act to force United to buy gas under Continental's unilateral terms. The majority summarily holds that United must buy or abandon nothwithstanding the fact that nowhere does the Natural Gas Act even remotely indicate that Congress intended to grant the Commission jurisdiction over the *purchase* of natural gas in interstate commerce. The Commission has uniformly so construed the Act by its action in granting sellers certificates of public convenience and necessity to initiate sales of gas without requiring any filing by the purchasers for certificates authorizing their purchases and by issuing countless orders permitting *sellers* to abandon certificated sales without requiring any filing by the *purchasers* for permission to abandon their purchases. Nothing in Section 7 of the Act holds that a certificate to sell carries with it a concurrent obligation for another party to buy. Stated simply, the Act does not guarantee any certificate holder a market.

Specifically, Section 7 authorizes issuance of certificates for the *operation, construction, extension,* or *acquisition* of

facilities and the sales and service rendered thereby. This categorical listing of the areas where certificates are required and the pointed omission of purchasing or receiving permits no ground for argument that certificates are required for either purchasing or receiving delivery of gas. United's cessation of purchasing cannot be considered a violation of any certificate and the Commission's use of the words "ceasing the operation" of facilities heretofore "operated" by United, in its show cause order clearly confirms this fact. It is pure fallacy to hold that whatever statutory restrictions apply to abandonment of a sale must also apply to abandonment of purchase. United's action cannot constitute an abandonment under Section 7(b) of the Natural Gas Act.

The majority further errs in finding: "If we are to assure the continuing adequacy of reserves dedicated to the interstate market, the indefinite cessation of purchases from sources, previously dedicated to that market, must be interpreted as an abandonment of service within Section 7(b)."[9]

The record shows that United has not discontinued or abandoned any service to its customers and does not propose to do so. The reserves attached to United's system have not been abandoned, because they remain physically attached to that system to this day. No amount of verbage can obscure one essential fact; the only "service" involved in this proceeding is the "service" Continental has been authorized to render to United from the Johnson Bayou Field pursuant to a certificate of public convenience and necessity issued to Continental in Docket G-6949. The term "service," as used in Section 7(b) has always meant a *seller's service* to *the purchaser*. Any other interpretation does violence to the statute.

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[9] *Mimeo* P-7.

Although the majority alludes to the *Sunray* case[10] with an interpretation that transcends all bounds of reasonableness, they totally ignore the position taken by the Solicitor General on behalf of the Commission in the *Sunray* case. The Solicitor General's brief[11] summarily disposes of the majority's contention and reveals their fatal error. Defining the term "service" he states, "As that term is used in Section 7(e) when read together with Section 7(b) and other provisions of the Act — the *'service' is the continuous furnishing of the gas to the purchaser.*" In short, "service" refers to fulfilling the demands of the purchaser of gas; the converse would be untenable and an impediment to effective regulation the Natural Gas Act was intended to achieve.

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The majority further errs in its analysis of the *Sunray* decision. Briefly stated, Sunray turned on the Commission's certificate authority, not on its authority to regulate abandonments under Section 7(b). The court held that the Commission's authority to control abandonments under Section 7(b) was co-extensive with the certificates it issues. If the Commission has not issued a certificate to purchase, it cannot control cessation of purchase under 7(b). This conclusion is inescapable for any other interpretation of the decision would render the Supreme Court's language meaningless.

Sunray created no new or preferential rights in the seller of natural gas to change rates under the Natural Gas Act. The court pointed out that a producer selling gas after its contract had expired would be free to file rate changes without the consent of the purchaser but, the court also cautioned that a producer availing himself of this right

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10 *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137.

11 P-23.

was obligated to continue gas deliveries *only at the buyer's request.* Referring to the contract, the court declared, "When it expires, the petitioner to be sure is under an obligation to deliver gas to United on United's request unless it can justify an abandonment before the Commission." This is the law; during the contract term, the producer has an obligation to sell, and the buyer an obligation to purchase, in accordance with the contract terms. After the expiration of the contract, a producer, absent abandonment authorization, has an obligation to continue to deliver gas to the purchaser but only on the purchaser's request not on the producer's demand and not at the direction of this Commission. There is an equitable balance of bargaining strength — the producer has the right, in the absence of contract, to unilaterally raise its price, the pipeline has the right to accept the price and receive deliveries or to reject the offer of sale. Any other result would render the pipeline's bargaining position a nullity in fact and be prejudicial to the public interest.

It is inconceivable that continuity of service is being utilized here as a tool to force a pipeline to purchase gas. This decision, if allowed to stand, will inevitably result in an increase in the average price of gas and run directly contrary to the admonition forcefully expressed in CATCO[12] to "hold the line." If United has no control over what it must pay for its gas, it will certainly be in no position to maintain its markets; the ability to fairly meet competition will be stifled. Such a drastic result goes beyond the permissible limits of regulatory authority.

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The decision of the presiding examiner should be affirmed and the order to show cause issued on May 1, 1963,

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[12] *Atlantic Refining Co., et al.*, v. *Public Service Commission of New York, et al.*, 360 U.S. 392.

directed to United Gas Pipeline Company should be dismissed and vacated.

/s/ HAROLD C. WOODWARD
Commissioner

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Docketed May 5, 1964

WESTERN UNION

ILF252 NSA328
NS SVA254 PD 3 EXTRA SHREVEPORT LA 5 229P CST
JOSEPH H GUDRIDGE, SECTY, FEDERAL POWER COMMISSION
441 G ST NORTH WEST WASHDC
RE CONTINENT OIL COMPANY DOCKET NUMBER C.I. 63-979. BY DECISION ISSUED TODAY THE FEDERAL POWER COMMISSION ORDERED UNITED GAS PIPE LINE COMPANY TO RENEW TODAY MAY 5, 1964, OPERATIONS ON ITS JOHNSON BAYOU FIELD FACILITIES WHICH ARE USED TO PURCHASE GAS FROM CONTINENTAL. UNITED WILL FILE WITH THE COMMISSION A PETITION FOR REHEARING OF THE ORDER AND IT HEREBY MOVES THAT THE COMMISSION STAY THE EFFECTIVE DATE OF THE ORDER FOR THIRTY DAYS AND THEREAFTER UNTIL SUCH TIME AS THE COMMISSION DISPOSES OF THE PETITION FOR REHEARING PLEASE BRING THIS MOTION TO THE COMMISSIONS ATTENTION AND ADVISE ME OF THE COMMISSIONS ACTION. WITH A COPY TO MR. W O CRAIN, UNITED GAS PIPE LINE COMPANY, PO. BOX 1407, SHREVEPORT, LA COPY THIS TELEGRAM IS BEING SENT TO CONTINENTAL. UNQUOTE

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VERNON WOODS 1708 BECK BLDG ATTORNEY FOR UNITED GAS PIPE LINE CO
C I 63-979 5 1964 1407 1708

492

Docketed May 6, 1964

WESTERN UNION
TELEGRAM

UDA224 WA448
(LL) (TLX 351) (THIS MESSAGE RECEIVED DIRECT FROM SENDER VIA
WU TELEX) TLX PD HOUSTON TEX 5 629P EDT
JOSEPH H GUTRIDE, SECRETARY FEDERAL POWER COMMISSION
DLR GUARD 441 G ST NORTHWEST WASHDC
RE TODAY'S TELEGRAM FROM VERNON WOODS, ATTORNEY FOR UNITED GAS PIPELINE COMPANY, CONCERNING CONTINENTAL OIL COMPANY DOCKET NO. CI63-979. CONTINENTAL HAS SUFFERED DRAINAGE AND LOSS OF REVENUE FOR FOURTEEN MONTHS DUE TO UNITED'S SHUTTING IN CONTINENTAL'S JOHNSON BAYOU WELLS. UNITED DOES NOT STATE HOW IT WILL SUFFER IRREPARABLE INJURY IF IT COMPLIES WITH THE COMMISSION'S ORDER. CONTINENTAL VIGOROUSLY OPPOSES AND OBJECTS TO UNITED'S TELEGRAPHIC MOTION FOR STAY OF THE ORDER OF THE COMMISSION ISSUED THIS DATE IN SAID DOCKET. COPY OF THIS TELEGRAM SENT TO VERNON WOODS AND W. O. CRAIN
BRUCE R MERRILL COUNSEL CONTINENTAL OIL CO

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Docketed May 6, 1964

WESTERN UNION
TELEGRAM

UDA238 WA512
(UD) (NS SVA337) LONG PD SHREVEPORT LA 5 530P CST
JOSEPH H GUTRIDE, SECY, FEDERAL POWER COMMISSION, DLR CARE GUARD
441 G ST NORTHWEST WASHDC
RE CONTINENTAL OIL COMPANY DOCKET #CI63-979. UNITED GAS PIPELINE COMPANY SUPPLEMENTS ITS MOTION TO STAY BY SHOWING THAT IF IT IS UNLAWFULLY REQUIRED TO PURCHASE GAS FROM CONTINENTAL AND TO PAY THEREFOR THE HIGHER RATE UNILATERALLY FILED BY CONTINENTAL THEN UNITED WILL BE IRREPARABLY INJURED BY HAVING BEEN FORCED TO BUY GAS IT DOES NOT NEED AND TO PAY THEREFORE A PRICE IT CANNOT RECOVER FROM CONTINENTAL IF THE ORDER IS SUBSEQUENTLY VACATED. COPY OF THIS TELEGRAM SENT TO CONTINENTAL
VERNON W WOODS ATTORNEY FOR UNITED GAS PIPELINE CO #CI63-979

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Docketed May 7, 1964

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Harold C. Woodward, and David S. Black

Docket No. CI63-979

CONTINENTAL OIL COMPANY

Order Granting Stay

(Issued May 7, 1964)

By telegram filed May 5, 1964 and supplemented May 6, 1964, United Gas Pipe Line Company has requested a stay of our Opinion and Order No. 426 issued May 5, 1964. There we determined that United's action in ceasing to utilize certain jurisdictional purchase facilities in the Johnson Bayou Field constituted an abandonment within Section 7(b) of the Natural Gas Act; we ordered United to renew operation of the facilities; and we required that purchases will be made at the rate specified in Continental's Supplement No. 7 to its FPC Gas Rate Schedule No. 115. By telegram filed May 6, 1964, Continental Oil Company has answered United's telegraphic request.

Because this is a case of first impression, because United states that it will file an application for rehearing, and because it appears that United might be irreparably injured if our order should be modified, we shall grant the stay requested.

The Commission orders:

United's request for a stay of the Commission's Opinion No. 426 and Order issued May 5, 1964, is granted until

issuance of the Commission's order upon United's application for rehearing.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE
Secretary

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Docketed May 11, 1964

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

DOCKET No. CI63-979

In the Matter of:

CONTINENTAL OIL COMPANY

Motion to Issue Errata Notice so as to Correct Opinion No. 426

Now comes Continental Oil Company (Continental) and moves the Commission to issue an errata notice deleting or correcting footnote 14 in Opinion No. 426. In support of its motion Continental would show as follows:

Footnote 14 at page 7 of the mimeo opinion states: "United presented evidence to show that Continental was the only producer in the Johnson Bayou Field. Presumably no drainage would be suffered, at present, . . ." This is an incorrect statement and contrary to all the relevant facts of record.

The source of this erroneous statement is in the oral argument presented by counsel for United Gas Pipe Line Company (United) at the bottom of Transcript page 147, and 149-150. Counsel for Continental corrected this

erroneous statement of fact in his oral argument at Transcript 171-172, and 174. In reply counsel for United did not disagree.

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Of course, these statements of counsel do not constitute evidence nor establish facts. We must turn to the record and to the Commission's own files for that purpose. The record clearly shows there are other producers of gas in the Johnson Bayou Field, that they sell to Transcontinental Gas Pipe Line Company, and that Continental is, during United's enforced shut-in, suffering drainage from its 160 acre lease in that field. See, e.g.: Transcript pp. 51, 59-60, 89-90, 92-101, 108-109, 110-112, 116, 124; Exhibit 1, Map of Johnson Bayou Field and Schedule.

In addition, the Commission's own files, of which administrative notice may be taken, reflect sales from the Johnson Bayou Field:

	Purchaser	Rate Schedule	Docket No.
General American Oil Co. of Texas	Transco	40	CI61-182
C. H. Lyons, Sr., et al	"	14	CI60-329

Continental urges that this eroneous statement of fact be deleted or corrected in Opinion No. 426 in order not to prejudice certain rights as between Continental and United. Continental does not seek rehearing because Continental is not aggrieved by the order accompanying Opinion 426.

Respectfully submitted,

BRUCE R. MERRILL
Bruce R. Merrill, *Counsel*
Continental Oil Company

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CERTIFICATE OF SERVICE

* * * * * * * * * * *

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Docketed May 15, 1964

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

DOCKET No. CI63-979

In the Matter of

CONTINENTAL OIL COMPANY

Answer of United Gas Pipe Line Company to Motion By Continental Oil Company to Issue Errata Notice to Opinion No. 426

Comes now, UNITED GAS PIPE LINE COMPANY (United) and for answer to the motion by Continental Oil Company asking the Commission to issue an errata notice to Opinion No. 426, it shows the following:

I.

If Continental is suffering or has suffered drainage in the Johnson Bayou Field, which United does not concede, then that drainage is the fault of Continental in having refused to sell its gas to United under the contract terms United offered. United has at all times been willing to purchase Continental's Johnson Bayou Field gas.

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II.

If Continental is suffering or has suffered drainage in the Johnson Bayou Field, it is also the fault of Transcontinental Gas Pipe Line Company who is purchasing gas from the wells allegedly draining Continental's wells and who has at the same time refused to purchase Continental's gas.

III.

Continental's obvious effort to seek some advantage in this proceeding through an allegation of drainage is a

"boot-strap" approach of pointing to self-inflicted consequences. Continental has at all times had a ready market for its gas. It has that market today. If it is suffering drainage, it is because it has chosen drainage in preference to accepting that market.

IV.

If an errata is issued, United asks that it clearly reflect that any drainage Continental has or may suffer is not the result of United's refusal to give Continental a market; that it is the result of Continental's own decision to suffer that drainage rather than to accept United's offer to purchase its gas and of Transcontinental

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Gas Pipe Line Company's refusal to purchase Continental's gas. Any different statement would prejudice United and be contrary to the facts.

Respectfully submitted,

UNITED GAS PIPE LINE COMPANY

By VERNON W. WOODS
Vernon W. Woods
Attorney

Counsel for
United Gas Pipe Line Company:

Wilbert O. Crain
Saunders Gregg
David Klotz
1525 Fairfield Avenue
Shreveport, Louisiana

Vernon W. Woods
Willis L. Meadows
P. O. Box 1707
Shreveport, Louisiana

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STATE OF LOUISIANA
PARISH OF CADDO

Personally came and appeared before me the undersigned, duly qualified and acting Notary Public, VERNON W. WOODS, who being by me, Notary, first duly sworn, deposes and says:

That he is attorney for United Gas Pipe Line Company and authorized to make this affidavit, that he has read the foregoing answer and that the matters of fact contained therein are true and correct to the best of his knowledge, information and belief.

VERNON W. WOODS
Vernon W. Woods

SWORN TO AND SUBSCRIBED before me on this the 13th day of May, 1964.

PIKE HALL, JR.
Notary Public in and for
Caddo Parish, Louisiana

(SEAL)

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CERTIFICATE OF SERVICE

(503)

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Docketed June 3, 1964

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

DOCKET No. CI63-979

In the Matter of

CONTINENTAL OIL COMPANY

Application for Rehearing and Alternative Motion for Stay By United Gas Pipe Line Company

* * * * * * * * * *

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COMES Now United Gas Pipe Line Company (United), asking a rehearing of Opinion No. 426, issued herein on May 5, 1964, and asserting that the Commission erred in ordering United to purchase Johnson Bayou Field gas at the higher rate unilaterally imposed by Continental Oil Company (Continental). In support of its application for rehearing and alternative motion, United shows:

I.

The Commission Erred In Basing Its Decision On The Factually Inaccurate And Misleading Assertion It Was Maintaining The Status Quo

Opinion No. 426 is a mandatory order by which the Commission directs and requires United to buy gas on terms unilaterally imposed by Continental. These terms include a new and higher price than United was paying Continental for its gas. The Commission, however, bases its order on the incorrect and misleading assertion that by so ordering the Commission is maintaining the status quo.

On page 8 of its opinion, the Commission refers to the requirements of Section 7(b) of the Act and says:

> "The mandate is clear that absent satisfaction of this test, which cannot be met by mere showing of contract termination, the *status quo* is to continue.
>
> "The absence of power to compel initial purchases does not refute this conclusion, * * * there is a vast distinction between the power to compel initial actions and the power to compel the continuation of these actions. The reason is obvious: once sales and purchases of gas flowing in interstate commerce begin, the interests of numerous parties become dependent upon their continuation."

But the Commission's order does not maintain the "status quo". Assuming the Commission has power to compel the continuation of "initial action", the Commission's order fails to do so. If it be true that, once sale of gas begins, the interests of numerous parties become dependent upon its continuation then the Commission has repudiated some of those interests by permitting one party to change the terms of the sale to its advantage and to the detriment of the other parties.

United is perfectly willing to maintain the "status quo", and no order of this Commission is required to force United to continue the "initial actions" it undertook in purchasing Continental's gas. Continental has refused to continue the "status quo" and the "initial actions" it undertook, not United.

Respectfully, the Commission should correct its opinion and

remove therefrom the misleading and the wholly incorrect rationalization that the decision is permitted and required because it continues initial action and maintains the status quo.

The facts in this case are not in dispute. United is willing to continue making the purchases from Continental which Continental was certificated to make and has offered Continental a contract to accomplish this. Respectfully, United is entitled to a decision based on the undisputed facts, including the fact that it has sought unsuccessfully to maintain the status quo and that it is willing to continue the initial action it undertook in purchasing Continental's gas. The Commission's assertion that its order maintains the status quo is error.

II.

The Commission Erred In Refusing To Recognize That Having Established Its Rate Ex Parte, Continental Offered Its Gas To United As A Prospective Customer

In its opinion the Commission does not consider United's arguments based on the *Mobile* and *Memphis* decisions.* It ignores the portions of those decisions cited by United and arrives at its decision without consideration of the recognized rights of a buyer purchasing at rates established ex parte by the seller. The Commission's holding does violence

to the fundamental and well-established principle of law stated in those decisions.

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* *United Gas Pipe Line Company* v. *Mobile Gas Corp.*, 350 U.S. 332, 100 L. ed. 373; *United Gas Pipe Line Company* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 3 L. ed. 2d 153, 79 S. Ct. 194.

In *Mobile* the Supreme Court stated in the clearest possible terms that the rate-making powers of natural gas companies were no different under the Act from those they possessed in the absence of the Act. Those powers, the court said, are: "to establish ex parte, and change at will, the rates offered to prospective customers; or to fix by contract and change only by mutual agreement, the rate agreed upon with a particular customer."

United has repeatedly insisted that if Continental has the right to establish ex parte and change at will the rates at which it sells its Johnson Bayou Field gas, that this right necessarily presupposes and that the ex parte rates are being "offered" to United as a "prospective customer". As a prospective customer United has declined Continental's offered rates because it does not currently need to purchase that gas to serve its customers.

The Commission has ignored the *Mobile* and *Memphis* decisions and United's arguments based thereon and erred in failing to recognize a buyer's rights when purchasing at rates fixed ex parte.

That the Commission has by its opinion conferred on Continental rate-making powers different and more advantageous than those

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Continental would have possessed absent the Act is certain; and that it has taken from United rate-making powers it would have possessed absent the Act is also certain. The Commission erred in attempting to do both.

The Commission has also erred in its analysis of the *Sunray* decision.* The Commission, while stating that

* *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392.

Sunray recognizes that obligation between parties, arising out of contract, may be unilaterally altered upon the termination of the contract, fails to take into consideration that the Court in the *Sunray* decision cautioned that a producer availing himself of this right was obligated to continue gas deliveries *only at the buyer's request.*

III.

The Commission Erred In Exceeding The Scope Of Its Show Cause Order And In Overruling Sub Silento United's Argument That If A Continuous Flow Of Continental's Gas To United's Customers Is Required, It Is Required On The Same Terms At Which It was Initiated

The Commission's show cause order directed United to show cause why it should not obtain the Commission's prior approval before "ceasing the operation" of facilities. The Commission's final order goes beyond the scope of the show cause order and requires not only an application to abandon before ceasing operations, but also orders that United shall:

(1) purchase gas from Continental; (2) purchase volumes consistent with the contract Continental cancelled; and (3) pay Continental the rate it had unilaterally filed. In so ordering the Commission exceeded the scope of its show cause order and erred.

United answered the Commission's show cause order by saying it had no intention to abandon operation of its facilities and it pointed out that Continental had unilaterally changed the terms on which it had initiated service to United and that United was doing nothing more than exercising its right as a prospective purchaser not

to buy under the ex parte sales arrangement newly imposed by Continental.

United argued that if the Act required the continuous and uninterrupted flow of gas from Johnson Bayou Field to United's customers, then that obligation rested equally on Continental and United and that Continental could not change the terms thereof unilaterally. United argued that the Commission had made no determination that the present or future public convenience and necessity required any change in Continental's rate and that if continuity of purchasing were required that Continental's unilateral action in increasing its rates to United was unlawful. The Commission was asked to reject Continental's unilateral rate filing and clear the way for United to resume purchases on the same basis it had initially undertaken.

Without so much as discussing United's argument, or giving any consideration to the lawfulness of Continental's unilateral rate filing, the Commission rejected United's arguments, assumed Continental's unilateral rate filing was lawful and sought to force United to accept the more onerous terms. In so doing, the Commission erred.

IV.

The Commission Erred In Utilizing The Abandonment Section Of The Act To Require Purchasing When The Act Otherwise Denies It That Power

Recognizing that it has not the power to require purchasing in the first instance and that it is denied the power to certificate and regulate purchasing of gas under Section 7(c) of the Act, the Commission has claimed power to require purchasing by reading into Section 7(b) broader powers than granted it by Section 7(c). In doing so, it erred.

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The Act did not give the Commission authority to certificate the purchasing of gas. Insofar as United is aware, the Commission has never issued any buyer a certificate to purchase any gas. Indeed, United has sold untold billions of cubic feet of gas to every conceivable type of purchaser and not one purchaser has ever obtained a certificate to purchase that gas.

United did not obtain a certificate to purchase Johnson Bayou Field gas and were it to ask for one today, the Commission would not issue

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such a certificate because it has no authority to do so under Section 7(c) of the Act.

Having no authority to require the initial purchasing of gas or to regulate the purchasing of gas through the issuance of certificates, the Commission cannot achieve that authority by indirection. Section 7(b) is not broader than Section 7(c), and the Commission cannot require authorization to abandon that which it never had authority to authorize in the first instance.

Moreover, the Commission erred when it said that Section 7(b) frames the relevant issue in this proceeding not in terms of whether this Commission has power to compel continued purchases, but whether the public convenience and necessity dictate that United cease purchasing. In its show cause order the Commission thought the issue was framed in terms of continued "operation" but in its opinion it sees it framed in terms of a distinction without a difference, that of not compelling continued purchasing but prohibiting the cessation of purchasing.

Section 7(b) makes no reference to either operation or purchasing. The terms do not appear in Section 7(b). Certainly, the section does not even purport to frame any

test with reference to whether public convenience and necessity permits pipelines to cease purchasing.

United can and will serve its customers by purchasing Johnson Bayou Field gas if and when it needs it. No service or facilities have

been abandoned by United and nothing more is prohibited by Section 7(b). The Commission's effort here is to read into Section 7(b) the power to force the purchaser to buy gas on terms unilaterally imposed by the seller. That power is not conferred on the Commission by Section 7(b) and the Commission's efforts to achieve it do violence to the clearly stated and long accepted meaning of Section 7(b).

V.

The Commission Erred In Holding That United's Action Contsituted An "Abandonment" Prohibited By Section 7(b)

The Commission held that United's action in ceasing to flow gas through certain purchase facilities for an undetermined period of time constitutes an abandonment of facilities within the meaning of Section 7(b). It also held that ceasing to draw upon gas reserves for an undetermined period of time constituted an abandonment of service* with Section 7(b). In so holding, it erred.

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* The accepted and correct meaning of service is reflected in the Commission's Opinion No. 401-A issued May 11, 1964, where the Commission quoted from the legislative history of the Act to show that *proposed service* meant *proposed sales*. The language from page 2 of said Opinion is as follows:

> "The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services [i.e., proposed sales] and the characteristics of the

The record is clear that the facilities remain in place, ready to transport gas when and if needed. United has not discontinued or abandoned sales of gas to any of its customers and will not do so. While United did not dedicate Continental's reserves to any markets, and the Commission erred in holding that it did, the fact is that the Johnson Bayou Field reserves remain physically attached to United's system and United will take Johnson Bayou Field gas, even at the unilaterally imposed higher price, if the gas is needed to continue sales to its customers.

The Commission errs in holding that an intention to abandon facilities and service necessarily follows from the absence of a stated intention to purchase and flow stated volumes on a continuous basis.

VI.

The Commission Erred In Depriving The Pipeline Buyer Of Bargaining Strength With The Producer

By its opinion the Commission has told the pipeline buyer that once a producer's gas has been attached to the pipeline system, that the pipeline forfeits all further bargaining strength with the producer.

The Natural Gas Act was never intended to create new and preferential rights in the producers of the natural gas at the expense of

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rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand."

the pipeline companies. Nothing in the Act itself or the legislative history of the Act evidences any such intention.

The Commission has conferred on the producer a status sought by the seller of any commodity—a guaranteed market on the most favorable terms possible for the seller.

VII.

The Commission Erred When It Held That United Has The "Right To Receive A Fair Return" And In Depriving United Of The Ability To Control Its Costs

Apparently seeking to justify, or render permissible, its requirement that United purchase Continental's gas at the higher rates unilateraly filed by Continental, the Commission asserts that United has the "right to receive a fair return" on its net investment in facilities. The obvious implication is that this "right to receive a fair return" is a power or privilege which United can enforce and that, being assured of a fair return, United has no ground to complain. United has no such right and the Commission erred in holding that it did.

The record reflects that United competes with producers and intrastate pipelines for its markets and that these competitors have been repeatedly successful in taking markets from United by offering gas at prices lower than United's prices. When United has come to this Commission to ask its assistance in saving its markets, the Commission has said it has no power to prevent raiding of interstate

markets by intrastate sellers.

United can gain a fair return on its net investment, if and only if, it can keep its costs low enough to permit it to keep its markets and to sell its gas at prices which will afford it a fair return. These considerations require business judgment of the highest level, and daily necessitate decisions based upon an evaluation of competition,

costs and prospective profits. But the Commission considers none of this in its opinion; it ignores United's problems while rigidly denying to United the power to control its costs.

United's management has concluded that in order successfully to meet competition, it must reverse the trend of its rising gas purchase costs. The Commission has told United that in this instance it canot do that. While the immediate effect of this particular decision may be de minimis, the long-range effect of the Commission's policy allowing the producers to fix unilaterally the price they will exact for their gas will be disastrous to United. United repeats that, almost without exception, its markets are located within reach of existing or potential intrastate sellers. These sellers include producers who have long since evidenced a willingness to sell their gas at prices cheaper than those permitted by this Commission and thereby make successful inroads into United's markets. How is United to meet this problem if it cannot control the prices it pays for gas? The Commission erred

in denying United the power to control its costs.

If the Commission's failure to deal with his problem in its opinion represents unawareness that the problem exists, then United trusts this application for rehearing will cause the Commission to consider the matter and correct its errors.

VIII.

The Commission Erred In Issuing A Mandatory Order So Vague And Indefinite That United Does Not Know What Is Required Of It

The Commission has ordered United to make purchases of Continental's gas in volumes consistent with the terms of

the cancelled contract. The contract specifies no volumes. United must interpret the contract and hazard the risk that its interpretation will prove to be the same as the Commission's.

Up to this point United's risk has been that of a civil action if its interpretation did not meet with Continental's approval. But that is no longer the case. United is now faced with criminal sanctions if its interpretation is wrong.

United cannot be required to guess at its obligations under these conditions. As in the case of any mandatory injunction, the performance required must be clearly, directly and unquivocally stated in terms that do not require those commanded to interpret and determine for themselves the scope and extent of the required performance.

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United does not know the minimum amount of gas it must purchase from Continental in order to comply with the Commission's order. Neither does it know whether Continental must have any minimum quantities of gas available for delivery to United. Is United to take delivery of all gas Continental can deliver to the meter station, or is it to take half of it? Must United take the same amount of gas everyday?

Does Continental have any obligation to maintain its delivery capacity, or is it free to do as it wishes so long as it delivers any gas at all?

Does the Commission intend that United's purchase obligations even under the cancelled contract be measured by the common purchaser laws of the State of Louisiana, as contended by Continental? Has this contention been overruled, or is United simply to guess at it?

United respectfully submits that the Commission has no power under the Natural Gas Act to prescribe any of the specific requirements it omitted from its order and that this omission reflects the Commission's acknowledgment that it has no power to force the purchasing of gas. This absence of power points up the error in the Commission's attempt

to take jurisdiction not given it by the terms of the Act.

IX.

The Commission Erred In Seeking To Enforce Part Of The Contract Cancelled By Continental

To avoid specifying the volume of gas United must purchase from Continental and the other obligations of a producer and pipeline company selling and buying gas, the Commission seized on the expedient of attempting to enforce, except for the rate provisions, the contract Continental had cancelled. In seeking to do so, the Commission erred, for the contract was nonexistent. It had been cancelled by Continental and consequently has no legal effect. It can fix no obligations between United and Continental and it can serve as the measure of none. Moreover, the Commission has no judicial authority to enforce contractual obligations in the first place.

All these matters the Commission has chosen to ignore in its opinion. It has assumed without any basis that it can renew a part of the contract which Continental cancelled in order to measure United's purchase obligations to Continental. In so doing, it has erred.

X.

The Commission Erred In Imposing More Onerous Terms On United Without Considering United's Needs And In Taking United's Properties Without Due Process of Law, Including Adequate Compensation

Obviously, regulation unilaterally imposed without consideration

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of the needs of the regulated company is not consistent with the requirements of due process. Continental's unilateral rate increase and the Commission's holding did not take into account United's needs and did not purport to do so. The Commission's order made no provision for recovery by United of the increased costs forced on it. In issuing its order the Commission did not consider whether United would be able to raise its rates and if it did so whether it would be able successfully to compete with its competitors and at the same time earn a fair return on its investment in facilities.

There has been no hearing or determination that United is willing and able to comply with the terms of the Act under the newly imposed terms and there has been no hearing and determination that the public convenience and necessity require United to purchase upon the terms unilaterally imposed by Continental.

United assigns as error the Commission's taking of United's properties without due process of law, including the adequate compensation required by the Fifth Amendment of the Constitution of the United States.

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XI.

If The Natural Gas Act Forces United To Purchase Gas On Terms Unilaterally Imposed By The Seller Without Consideration Of The Needs Of United Then The Act Is To That Extent Unconstitutional

If the Natural Gas Act does contain provisions, which United denies, that permit Continental unilaterally to fix the quantities of gas United must buy and the rates it must pay, all without consideration of the needs of United and without making provisions for United to recover the increased costs forced upon it, then the Act is to that extent unconstitutional.

If the Act permits such action, then United's properties have been taken from it and its ability to maintain its markets and earn a reasonable return have been placed beyond its control. Obviously, the Act does not guarantee United the adequate compensation required by the due process provisions of the Constitution for such taking of its properties. Indeed, the Natural Gas Act does not guarantee United any market, or any return on its investment in facilities, or freedom from competition from those, including Continental, who would unilaterally fix the price United must pay for gas.

United says that if the Act permits such taking, without provision for adequate compensation, it is to that extent violative of the Fifth Amendment of the Constitution of the United States and therefore unlawful.

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XII.

Alternative Motion For Stay

In the event the Commission denies this application for rehearing or otherwise leaves in effect its order requiring

United to purchase Continental's gas at the increased rate unilaterally filed by Continental, then United respectfully moves that the Commission stay until completion of final judicial review, the effectiveness of so much of its opinion as has effect to force United to renew operations of its Johnson Bayou Field facilities by purchasing gas from Continental in volumes consistent with the terms of the previously executed contract and to pay therefor the rate specified in Continental's Supplement No. 7 to its F. P. C. Gas Rate Schedule No. 115. In support thereof, United shows:

United will appeal the Commission's Opinion No. 426, if it is not corrected upon rehearing, and if it is forced to comply with the Commission's order pending completion of final judicial review, it will be irreparably injured. Irreparable injury will result as a consequence of United being forced to purchase gas in quantities it does not need and to pay therefor a higher price than it has agreed to or can recover in full from its customers. If the order is subsequently reversed, United will not be able accurately to determine the extent of its damages and it will not be able to recover from Continental the

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price it paid Continental for the gas it was unlawfully forced to purchase.

The Commission has said this is a case of first impression and certainly United has made a strong showing that it is likely to prevail on the merits upon appeal. The public interest will not be adversely affected by granting a stay because United can fully and adequately serve the requirements of its customers without utilizing Johnson Bayou Field gas.

Granting the requested stay would be entirely consistent with the Commission's action in granting a stay pending action on United's application for rehearing.

WHEREFORE, United Gas Pipe Line Company prays that the Commission grant rehearing of its Opinion No. 426, issued May 5, 1964, and that upon rehearing it affirm the decision of the Presiding Examiner and recall and vacate its show cause order. In the alternative, should the Commission deny United's foregoing request, United moves that the Commission stay, pending completion of final judicial review, so much of its Opinion No. 426 as has effect to require United to renew operations of its Johnson Bayou Field facilities and to purchase gas from Continental in volumes consistent with the terms of the previously executed contract and to pay Continental therefor the rates

specified in Continental's Supplement No. 7 to its F. P. C. Gas Rate Schedule No. 115.

Respectfully submitted,

UNITED GAS PIPE LINE COMPANY
By VERNON W. WOODS, *Attorney*

Counsel for

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STATE OF LOUISIANA
PARISH OF CADDO

BEFORE ME, the undersigned Notary Public, personally came before me C. C. BARNETT, who being duly sworn deposed and said that he is Vice President of United Gas Pipe Line Company and that all the allegations of fact set forth in the foregoing application for rehearing are true and correct.

C. C. BARNETT

SWORN TO AND SUBSCRIBED before me this 1st day of June, 1964.

VERNON W. WOODS
Notary Public in and for
Caddo Parish, Louisiana

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CERTIFICATE OF SERVICE

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CONTINENTAL OIL COMPANY

Docket No. C163-379

Application by Texas Eastern Transmission Corporation For Rehearing of Opinion No. 426 And Order Issued May 5, 1964

Docketed June 4, 1964

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Now COMES Texas Eastern Transmission Corporation (Texas Eastern) pursuant to Section 1.34 of the Commis-

sion's Rules of Practice and Procedure and Section 19(a) of the Natural Gas Act, and files this its Application for Rehearing complaining of the Commission's Opinion No. 426 and order issued in the above captioned proceeding on May 5, 1964.

SPECIFICATION OF ERRORS

1. The Commission erred in finding that there has been an abandonment within the scope of Section 7(b) by United Gas Pipe Line Company (United) of its gas purchase facilities in the Johnson Bayou Field, Cameron Parish, Louisiana.

2. The Commission erred in finding that United has refused to renew purchases of gas in the Johnson Bayou Field from Continental Oil Company (Continental).

3. The Commission erred in failing to affirm the

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Presiding Examiner's Decision issued October 28, 1963, which dismissed and vacated the Commission's Order to Show Cause dated May 1, 1963.

4. The Commission erred in finding that by ceasing use of its gas purchase facilities upon termination of its gas purchase contract, United has "abandoned" them within the meaning of Section 7(b).

5. The Commission erred in its interpretation of the Supreme Court's decision in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 US 137 (1960).

6. The Commission erred in finding that gas reserves connected to the system of a pipeline through contracts are included within the definition of "service" rendered by the pipeline under Section 7(b) of the Act.

7. The Commission erred in suggesting that Continental's gas reserves in the Johnson Bayou Field have been dedi-

cated by United to a particular jurisdictional customer or to the interstate market.

8. The Commission erred in finding that the cessation of purchases of gas upon termination of a gas purchase contract must be interpreted as an

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abandonment of service within the meaning of Section 7(b).

9. The Commission erred in finding that a determination under Section 7(b) as to the "public convenience and necessity" must be made prior to a pipeline ceasing gas purchases after its gas purchase contract has been terminated by the seller.

10. The Commission erred in finding that the power to compel the continuation of sales would be reduced to mere illusion in the absence of the power to compel the continuation of purchases.

11. The Commission erred in ordering United to renew the use of its facilities to purchase gas under terms unilaterally imposed by Continental.

12. The Commission erred in finding that United's purchases must be made at Continental's unilateral rate and in volumes consistent with the terms of the contract terminated by Continental.

ARGUMENT

By its opinion in the present proceedings the Commission has asserted authority to compel a pipeline company to continue to operate its facilities for the purpose of purchasing gas which it does not need

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under terms and conditions unilaterally imposed by a producer-seller in the absence of any contractual relationship

between it and the seller. This decision by the Commission is in absolute derogation of the Supreme Court's decision in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 US 137 (1960), and completely beyond the jurisdiction of the Commission.

The fundamental issue in this procedure is whether the Commission does in fact have the jurisdiction over gas purchases which it has asserted herein by the indirect method of utilizing its power over abandonment under Section 7(b) of the Act for the purpose of requiring United to institute an entirely new purchase of gas under terms unilaterally imposed by Continental after Continental's ex parte termination of its contract with United. In arriving at this novel decision the Commission seeks support from the fact that the scope of Section 7(b) has been held to be co-extensive with that of Section 1(b) of the Act.[1] This is precisely the position of Texas Eastern. Section 1(b) of the Act determines the Act's coverage and under that section the Commission is delegated no authority whatsoever over gas purchases. Quite the contrary, Section 1(b) of the Act specifically limits the Commission's jurisdiction "to the transportation of natural gas in

interstate commerce, to the sale in interstate commerce of natural gas for resale * * * and to natural-gas companies engaged in such transportation or sale * * *." Nowhere does Section 1(b) or any other section of the Act even remotely indicate that Congress intended to grant the Commission jurisdiction over either the commencement or the cessation of the purchase of natural gas in interstate commerce. The limited authority granted by Section 1(b) is specificaly caried forward into the other sections of the Act and circumscribes the Commission's jurisdiction under those sections. *FPC* v. *Panhandle Eastern Pipe Line*

[1] Slip Op. p. 1.

Co., 337 US 498 (1949). It is therefore obvious that the fundamental and far-reaching jurisdiction over gas purchases and purchasers which the Commission here attempts to invoke cannot emanate from Section 7(b) or any other section of the Act because all sections of the Act must be reconciled so as to produce a symmetrical whole. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F. 2d 675 (CA 3 1953).

The Commisshion rationalizes that "if the power to compel the continuation of sales is not to be reduced to mere illusion, the power to compel the continuation of purchases must be its correlative" (Slip Op. p. 9). However, if logic requires that the Commission must have the power to compel the pipelines to continue purchases from independent producers at the supply end of their lines, then it necessarily follows that the Commission must have the same power to compel municipalities and distributing companies to continue purchases from the pipelines at

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the market end of the lines. We have searched the Act in vain for any provision even remotely suggesting that the Congress intended to grant the Commission such powers. In fact, it is quite clear that the Act gives the Commission no jurisdiction whatsoever to compel either the initiation or the continuation of gas purchases by either the pipelines or their customers.

The fact that a purchaser of gas has never been required to obtain a certificate makes it clear that the "whole body of public rights and responsibilities" referred to by the Commission simply do not arise by virtue of the purchase of gas. In the scheme of the Natural Gas Act there are certainly no public service rights or responsibilities which run from the purchaser of gas to the seller. That public service responsibilities run only to the transportation and sale of gas in interstate commerce simply reflects the

scheme of regulation under the Act, and does not create an inequitable situation as between the producer-seller and pipeline-purchaser nor on the other hand as between the pipeline-seller and the distribution company-purchaser. This has been so perfectly clear during the twenty-six year history of a thoroughly administered and litigated Natural Gas Act as to have never before been questioned.

It is interesting to note that the Commission now says it "would be most derelict in failing to accord it (Section 7(b)) the

strict enforcement for which it was written."[2] Yet the Commission acknowledges that "Section 7(b) reads today as it did twenty-six years ago."[3] If Section 7(b) of the Act requires the Commission to exercise the far-reaching jurisdiction over gas purchasers it now claims, why has the Commission been "most deredict in failing to accord it the strict enforcement for which it was written" over the past twenty-six years? Why during these twenty-six years have not the consumers insisted that the Commission exercise these powers which the Commission now says are so necessary to their well being? The short answer is that Section 7(b) confers no such powers on the Commission. As the Supreme Court stated in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 US at 513:

> "Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include produc-

[2] Slip Op. p. 9.

[3] Ibid p. 9.

tion. If possible all sections of the Act must be reconciled so as to produce a symmetrical whole. We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power."

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The majority seeks to assert jurisdiction over United's gas purchasers upon the reasoning that (1) cessation of the use of a meter station, 55-feet of 4-inch line and valves constructed at a total cost of $6,884 constitutes an abandonment of facilities dedicated to a public use (Slip Op. pp. 2-6) and (2) cessation of the purchase of gas at the termination of a contract constitutes an abandonment of service in the sense that reserves dedicated to the interstate market or to a particular customer have been abandoned (Slip Op. pp. 6-9).

In the first place the Commission recognizes that "no certificate was ever applied for, or granted, for the Johnson Bayou Field purchase facilities" (Slip Op. p. 4). This 55-feet of 4-inch line and appurtenances are clearly gathering facilities exempted from the jurisdiction of the Commission under the express provisions of Section 1(b) of the Act. Thus, irrespective of whether such facilities have been dedicated to a public use, there could not have been any abandonment of them within the meaning of Section 7(b) of the Act because Section 7(b) is specifically limited in scope to "facilities subject to the jurisdiction of the Commission." Moreover, even if it is assumed, *arguendo*, that the gathering facilities of United are subject to the Commission's jurisdiction, mere cessation of use does not constitute abandonment of such facilities within the meaning of Section 7(b) of the Act for the reasons so clearly set forth in the dissenting opinion of Commissioner Woodward.

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The Commission's reasoning that there has been an abandonment of dedicated reserves, and hence an abandonment of service, is likewise without merit. Since the Act gives the Commission no jurisdiction over the act of purchasing gas, the cessation of this non-jurisdictional act cannot by any stretch of the imagination constitute an abandonment of a jurisdictional service. In addition, we know of no support whatsoever for the Commission's erroneous conclusion that United has dedicated the Continental reserves in the Johnson Bayou Field either "to the interstate market" or "to a particular jurisdictional customer" (Slip Op. pp. 6-7). It is true that United, like other pipeline companies, has submitted evidence from time to time as to the total gas reserves connected to its system as a part of applications for certificate authority to make jurisdictional sales of gas. However, we are not aware of any instance in which United or any other pipeline company has ever purported to dedicate any particular reserve or reserves either to the interstate market or to any particular jurisdictional customer. Quite the contrary, all of the reserves connected to United's system are equally available to both the interstate and intrastate markets and neither market has any preferential or dedicated rights to such reserves or any particular portion thereof.

Further, since United has never owned Continental's Johnson Bayou Field reserves, it could not have made a valid dedication of such reserves to the interstate market even if it had desired to do so.

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The only rights United ever owned with respect to such reserves consisted in the contract right to purchase gas under the terms of its contract with Continental dated

January 22, 1953. It owned no more. It could dedicate no more. Accordingly, even if these contract rights had been dedicated exclusively to the interstate market, the dedication would have automatically ceased at the time the contract rights ceased as a result of Continental's unilateral election to terminate the contract with the acquiescence of the Commission. The Commission, therefore, has erred in reasoning that United's act of ceasing to purchase gas upon Continental's ex parte termination of United's contract rights to purchase operated to deprive the interstate market of reserves dedicated to that market by United.

Finally, although the Commission suggests that the purpose of its order is to maintain the *status quo* [4], it should be recognized that the effect of the order is exactly the reverse. The only purchase United ever made from Continental in the Johnson Bayou Field was under the terms of the contract dated January 22, 1953. The evidence shows that United stands ready, willing and able to continue that purchase but Continental refuses to continue the sale. The Commission has aided and abetted Continental in its election to cease the sale by permitting Continental to terminate the contract of January 22, 1953, and by ordering United to purchase gas under an entirely different proposal of Continental's unilateral choosing. These acts of the Commission obviously operate to

change rather than maintain the *status quo*. The effect of the order is not to compel the continuation of an existing purchase, but, instead, to require the initiation of an initial purchase, a power which the Commission recognizes it does not have (Slip Op. p. 8).

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[4] Slip Op. p. 8.

Conclusion

For the foregoing reasons Texas Eastern respectfully prays:

(1) That a rehearing be granted with reference to the Commission Opinion No. 426 and order issued herein on May 5, 1964; and

(2) That on said rehearing the Commission withdraw said Opinion No. 426 and order issued May 5, 1964, and affirm the Presiding Examiner's Decision dated October 28, 1963, dismissing and vacating the Commission's Order to Show Cause issued May 1, 1963, directed to United Gas Pipe Line Company.

Respectfully submitted,

Texas Eastern Transmission Corporation
By Jack D. Head
Vice President and General Counsel
P. O. Box 2521
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Of Counsel:

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Dated: June 2, 1964

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VERIFICATION

THE STATE OF TEXAS
COUNTY OF HARRIS

Jack D. Head, being first duly sworn, states that he is Vice President and General Counsel of Texas Eastern Transmission Corporation; that he is authorized to execute this affidavit; that he has read the above and foregoing Application by Texas Eastern Transmission Corporation for Rehearing of Opinion No. 426 and Order Issued May 5, 1964, and is familiar with the contents thereof; and that all allegations and facts contained therein are true and correct to the best of his knowledge, information and belief.

JACK D. HEAD

SUBSCRIBED AND SWORN TO before me, Notary, this 2nd of June, 1964.

FLORRIS H. PLOWMAN
Notary Public in and for Harris County, Texas

(SEAL)

My Commission expires June 1, 1965.

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CERTIFICATE OF SERVICE

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[Docketed June 8, 1964]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of

CONTINENTAL OIL COMPANY

DOCKET No. CI63-979

Answer in Opposition to Motion for Stay

Comes now CONTINENTAL OIL COMPANY and submits this Answer in Opposition to the Alternative Motion for Stay filed by United Gas Pipe Line Company in conjunction with its Application for Rehearing of Opinion No. 426 issued in the captioned proceedings. In opposition to United's Motion for Stay of Opinion No. 426 until completion of final judicial review, Continental would respectfully show as follows:

I.

United contends that if the Commission denies its Application for Rehearing or otherwise requires United to purchase Continental's gas from Johnson Bayou Field, United will be irreparably injured by being forced to purchase gas in quantities which it does not need and to pay a price to which it has not agreed and which allegedly it cannot recover in full from its customers. The assertions made by United are not true. From the record in this proceeding

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the Commission cannot conclude that United does not need the Johnson Bayou gas. United has previously claimed and proved a need for this gas by taking the total Johnson Bayou reserve as part of its system supply. The Commission has found that the gas is needed by United and its customers, and United has not demonstrated proof to the contrary.

United also alleges it cannot recover in full the cost of purchasing the Johnson Bayou gas from its customers. There is no showing or reason to conclude that United cannot obtain any rate increase which it may need to reflect gas purchase costs in full. United in fact is paying more for equivalent or smaller new reserves of gas that it would pay for gas from the Johnson Bayou Field under Continental's unilateral rate. The record shows that United has purchased equivalent reserves in South Louisiana under new contracts at 18¢ to 19.75¢, including tax reimbursement, compared to the 15.75¢ price, including tax reimbursement, at which United can buy Continental's Johnson Bayou gas; these higher price contracts were made by United after termination of Continental's contract at Johnson Bayou (Tr. pp. 30-35). Moreover, Continental's unilateral rate is well below United's average cost of purchased gas, which was approximately 17.7¢ per Mcf for 1962, as shown by official

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reports available to the Commission.[1] United cannot prop-

[1] See the Commission's "Statistics of Natural Gas Companies for Year Ended December 31, 1962." United's purchased gas volumes for 1962 are shown at line 107, page 410A thereof, to be 1,301,470,691 Mcf at 14.73 psi; United's total purchased gas costs for 1962 are shown at line 61, page 310, of the same report to be $230,265,210; in 1962 total purchased gas costs divided by volumes of natural gas purchased show an average purchased gas cost for 1962 of approximately 17.7¢ per Mcf.

erly assert at this time and on this record that it will be required to pay a higher price for the Johnson Bayou gas than it can recover in full from its customers.

Finally, United alleges irreparable injury in that if Opinion No. 426 is reversed United would not be able to determine accurately the extent of its damages and to recover from Continental the price it paid Continental for gas United might have been forced unlawfully to purchase. If Opinion 426 should ultimately be determined to be unlawful and Continental's unilateral rate should be determined to be inapplicable to purchases which United made under unlawful duress, United would then be left with full remedies available to it to pursue legal actions to recover money unlawfully paid to Continental. United would have no difficulty in accurately determining the extent of damages occasioned by payment for gas taken in compliance with the Commission's order in Opinion No. 426. The quantities of gas taken, the price paid therefor, and the fair market value of the gas in the area would all be readily

known. United could pursue any available remedy for recovery of that part of the unilateral price paid to Continental in excess of the market value of the gas, assuming that the unilateral price were in excess of the market value and assuming that United ultimately prevailed in its contention that Opinion No. 426 is unlawful in requiring United to take gas at Continental's unilateral effective rate.

II.

United asserts that if it is forced to comply with the Commission's order in Opinion 426 and take gas from Continental, it will be irreparably injured. Any injury

to United, while certainly not irreparable, is moreover prospective and speculative at best.

However, in this case there is no longer a question that Continental *will be* irreparably injured. Continental has already been irreparably injured every day that United has refused to take gas since February 1, 1963, and Continental will continue to be irreparably injured every day at least until the Commission acts on the rehearing and so long as United may refuse to take gas. United's customers and the consuming public relying on gas from United's system also are the losers, and have been since February 1, 1963. These customers and consumers have beeen irreparably injured and will continue to be irreparably injured, along with Continental, every day until United

resumes ratable takes of gas from Johnson Bayou Field. Continental, United's customers, and the consuming public have been deprived and are being deprived day by day of gas dedicated to United's system which is being drained away and forever lost to Continental and customers and consumers relying upon United's system. Every day that United does not take gas from Johnson Bayou Field, Continental's reserves dedicated to United in that field are being drained away by other producers and irretrievably lost to United's system. It would be unconscionable for the Commission to perpetuate this enforced shut-in of interstate dedicated gas wells for another year or more after final action on United's application for rehearing, during which United may exhaust its rights to judicial review of Opinion 426. United's customers and the consuming public who obtain gas from those customers are also losers in the long run because the gas which United does not take and which is lost by drainage will

some day have to be replaced in United's system by other gas, which almost certainly will be purchased at higher prices than United would have to pay for the Johnson Bayou gas thus lost to its system. Every day that United does not take gas from Johnson Bayou Field adds to the irreparable injury already put upon United's customers and the consuming public, as well as Continental.

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Continental also has suffered, and continues to suffer day by day, irreparable injury in the deprivation of property without compensation. Continental is being deprived of revenues from Johnson Bayou Field today, and has been deprived of revenues for the last year and a half. Whenever United finally starts taking gas in accordance with Opinion 426, the revenues which Continental will then realize will always be a year and a half behind the revenues which Continental should lawfully have received had United complied with its obligation and continued taking gas from and after February 1, 1963.

Finally, Continental continues to run the hazards of lease forfeiture for prolonged cessation of production of gas from Johnson Bayou Field. If such cessation of production ever culminates in forfeiture of Continental's Johnson Bayou leases, the injury to Continental will be complete and quite irrevocable, running well into millions of dollars worth of valuable producing properties.

III.

United has already long overdrawn its stay of the law. First, by its willful and capricious action in shutting in Johnson Bayou Field without Commission authorization, United on its reckless own stayed fulfillment of its lawful obligation to take gas from Johnson Bayou Field from January 31, 1963, until May 5, 1964. Now United is

living on borrowed time until the Commission acts on rehearing of

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Option 426, gaining to the fullest the advantage given by the Commission in staying Opinion 426 until the Commission acts on rehearing. In all good conscience, United is not entitled to any further stay of Opinion 426. The equities as between Continental, who is not in violation of the Act, and United, who has been found to be in violation of the act, weigh heavily in favor of Continental.

The Commission granted only a limited stay of that opinion until it acts on rehearing. United should not now be heard to ask the Commission for a further stay.

IV.

Even assuming, *arguendo,* that United were to suffer irreparable injury, the extent and effect of any injury to United must be weighed against that which would be suffered by Continental and by United's customers and the consumers relying on United's system. Any injury to United would be *de minimis.* The average daily take by United from Johnson Bayou in 1962 was 1,000 to 1,500 Mcf (Tr. 42). United's total average daily take over its system in 1962 was about 3,566,000 Mcf per day.[2] The impact on United of any gas costs attributable to takes from Johnson Bayou Field is exceedingly small. The *de minimis* impact of any

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injury on United cannot balance the irreparable injury to Continental and United's customers and the consuming public. Gas irretrievably lost to Continental and the con-

[2] "Statistics of Natural Gas Companies for Year Ended December 31, 1962," total natural gas purchased for 1962 divided by 365 (line 107, page 410A).

sumers relying on United is the real irreparable injury in this case.

V.

United has not made the requisite strong showing that it is likely to prevail on the merits upon appeal of Opinion 426. United really does no more than assert that this is a case of first impression. Merely because a case presents novel issues of law which may be subject to judicial review on first impression, there is no reason to stay a valid order of the Commission pending such review.

For all of the foregoing reasons, United's Alternative Motion for Stay of Opinion 426 until final judicial review of that opinion should be denied.

Respectfully submitted,

TOM BURTON, *Attorney for*
Continental Oil Company

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AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Tom Burton, who, being by me duly sworn, on oath deposes and says: That he is an attorney for Continental Oil Company, authorized to sign the foregoing answer; and that the facts set forth therein are true to the best of his information and belief.

TOM BURTON

Sworn to and subscribed before me, this 5th day of June, 1964.

HALLIE P. MADELEY
Notary Public in and for
Harris County, Texas

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CERTIFICATE OF SERVICE

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 426-A

CONTINENTAL OIL COMPANY

DOCKET No. CI63-979

Opinion and Order Denying Applications for Rehearing and Stay

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(Issued July 2, 1964)

O'CONNOR, *Commissioner:*

In Opinion No. 426, issued May 5, 1964, we held that United Gas Pipe Line's (United) act of January, 31, 1964, resulting in the complete non-use of jurisdictional facilities and indefinite cessation of purchases from reserves from which gas previously flowed in interstate commerce, constituted an abandonment of facilities and service within Section 7(b) of the Natural Gas Act. An application for stay, limited to the date of this order, was filed by United on May 5, and granted by the Commission on May 7. On June 3, 1964, United filed an application for rehearing and, in the alternative, a stay pending final, judicial determination of the opinion and accompanying order. On June 4, an application for rehearing was filed by Texas Eastern Transmission Corporation (Texas Eastern) which had intervened in the proceedings before the Presiding Examiner. On June 8, Continental Oil Company (Continental), from which United had ceased to

purchase, filed an answer in opposition to the application for a stay pending final judicial determination.

United urges error in not holding it to be a "prospective customer" of Continental and thus one to which unilaterally-increased rates may be offered but not imposed. In asserted support, United cites the following Supreme Court statement from *United Gas Co.* v. *Mobile Gas Corp.*:

> "The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and to change at will, the rates

> offered to prospective customers; or to fix by contract, and charge only by mutual agreement, the rate agreed upon with a particular customer."[1]

The Court, speaking in the context of the pipeline-distributor relationship, was referencing "prospective customers" as those with whom contracts had not been entered. The Court was not referring to previous purchasers, with whom contracts had been made; by whom certificated or certificable facilities had been constructed and placed into operation; to whom producers were obligated to continue to sell; and, upon whom, producers, offtimes by possessing residual reserves too marginal to interest other purchasers, had become solely dependent. The statement clearly will not support the proposition that pipeline purchasers, operating jurisdictional facilities and rendering services thereby, are free to reject at their discretion, lawful rate increases.

United also urges error in that the opinion did not prescribe the precise terms under which United was to con-

[1] 350 U.S. 332, 343 (1956).

tinue to purchase Continental's gas; that the Commission was seeking to enforce contracts, an activity contended to be outside its statutory authority; and that, at any rate, the contract had been cancelled by Continental.

United's first point is without merit. Prior to its abandonment, United never felt compelled to ask the myriad of questions it now raises, as to how it should comply with its obligations under the certificate inasmuch as the contract itself provided the answers. United obviously was capable, in the ten years during which the contract was in effect, to conduct its purchasing in a manner consistent with the contract. We feel certain it could do so now, and that the order, which merely directed it to comply with its obligations under the expired contract (except to the extent we have approved filed rate changes) until it receives abandonment authority, is not subject to attack on the grounds of vagueness. Moreover, to specify conditions, as United suggests, would be inconsistent with our aim of merely continuing the purchase pattern existing at the time of Continental's filing. We will specify conditions, if at all, only in the event United fails to show that the public convenience and necessity permits the abandonment already effected. As yet, United has not chosen to avail itself of its statutory right to make such a showing.

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United's second and third points are likewise without merit. Opinion No. 426 did not seek to enforce contract obligations; it sought to enforce statutory obligations. Consequently, it is irrelevant that Continental rather than United exercised the specified option to cancel the contract, or in fact, that the contract had been cancelled. Further, we find no inconsistency in our ordering United to operate pursuant to the underlying contract, while at the same time allowing a rate to be charged not contem-

plated by that contract. As the *Sunray* case reveals a producer has the right to file a change in the terms of its certificate at the expiration of the underlying contract, and such a change may become effective either on thirty days notice if the Commission does not suspend, or subject to refund after a potential five month suspension period. For purposes of Section 7(b), however, those terms that are not specifically altered in this manner are to remain in effect until one party justifies an abandonment.

Texas Eastern takes exception to our statement that ". . . if the power to compel the continuation of sales is not to be reduced to mere illusion, the power to compel the continuation of purchases must be its correlative."[2] It argues ". . . if logic requires that the Commission must have the power to compel pipelines to continue purchases from independent producers at supply end of the line, then it necessarily follows that the Commission must have the same power to compel municipalities and distributing companies to continue purchases from the pipelines at the market end of their lines."[3] We feel that the contention of Texas Eastern is fallacious. Here we are dealing with two natural-gas companies, both of which are subject to our jurisdiction under the Natural Gas Act. This Act provides that all companies subject thereto must obtain our permission and approval prior to abandoning facilities or service. On the other hand the Commission has no jurisdiction over local distribution companies. It is a *non sequitur* to contend that we must exercise non-existent authority over local distribution companies in order to administer effectively authority which has been delegated

[2] Slip opinion, p. 9.

[3] Application by Texas Eastern Transmission Corporation for Rehearing of Opinion No. 426, pp. 5-6.

to the Commission. If distribution companies are to be required to secure approval before abandoning a service they are taking from a particular pipeline, this approval, of necessity,

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must be sought from a state agency. The fact that we do not exercise this power over local distribution companies or the possibility that some states may not choose to do so does not detract from the validity of our statement that the power to compel the continuation of producer sales, where the public interest so dictates, would be largely illusory if we could not compel the continuation of pipeline purchases.

United and Texas Eastern assail our conclusion that ". . . absent satisfaction of (Section 7(b)), which cannot be met by mere showing of contractual termination, the *status quo is* to continue."[4] They contend that we have violated our own rationale by allowing Continental to file for a rate higher than allowed by contract, thus premising the *status* as that period prior to December 28, 1962, the date Continental filed its increase.

Their error lies in the point-in-time they chose. There is no doubt but that producers are free to file rate increases upon contract termination.[5] Procedurally, these unilaterally-filed rate increases are no less lawful than mutually-agreeable filings, filed during the course of the contract. The only distinction is that, in the former instance, the purchaser in addition to his right to oppose the rate increase filing is afforded the opportunity, under Section 7(b), to prove that the public convenience and necessity does not require it to purchase at the filed rate.

[4] Slip opinion p. 8.

[5] *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960).

Contract termination, alone, does not obviate the need to comply with this Section. For producers, that need remains so long as there is an outstanding certificate. For purchasers, it remains so long as jurisdictional facilities are in existence.

On May 11, 1964, Continental filed a motion to correct footnote 14 wherein we state that it was the only producer of record in the Johnson Bayou Field. An examination of the record, as well as our own public files, indicate that the statement was erroneous. Not only are other producers operating in the Johnson Bayou Field, but several are also producing from the same reservoirs as Continental. Presumably, Continental is currently suffering drainage, and footnote 14 will be appropriately amended.

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On June 8, 1964, Continental filed an answer in opposition to United's request for a stay. It contends that granting such a request would irreparably injure Continental by causing drainage and possible lease forfeiture. We are satisfied that such injury is likely to accrue; that the dollar-impact on United of an order compelling continued takes until it justifies its abandonment would be *de minimis;* and that, at any rate, if Opinion 426 is finally reversed in the courts, United will possess legal remedies to recover excess payments. United's request, failing to meet the standards of *Virginia Petroleum Jobbers* v. *FPC,*[6] must be denied.

The Commission finds:

No new facts or principles of law have been presented in the applications for rehearing which were not fully considered by the Commission prior to the rendition of the aforesaid opinion and order, or, having now been so con-

[6] 259 F. 2d 921 (D.C. Cir. 1958).

sidered, warrant further hearing, modification or revocation of said opinion and order, except as specified below.

The Commission orders:

(A) The applications for rehearing filed herein by United Gas Pipe Line Company and Texas Eastern Transmission Corporation are hereby denied.

(B) The stay requested by United Gas Line Company is hereby denied.

(C) Footnote 14 on page 7 of the slip opinion shall be modified to read as follows:

> "[14] Testimony adduced in this proceeding, corroborated by Commission files, indicates that other producers are operating in the Johnson Bayou Field (Record, volume 1, pp. 171-72, 174), and, in fact, producing from the same reservoirs as Continental. *Id.* at 90. Even in the absence of drainage, producers aban

> doned under circumstances as now before us could present a strong justification under Section 7(b) for allowing severance from their previous purchaser, thus freeing their gas from its interstate dedication."

By the Commission. Commissioner Woodward dissenting stated that the applications for rehearing and stay should be granted.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

[fol. 466]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21693

UNITED GAS PIPE LINE COMPANY, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

PETITION FOR REVIEW OF ORDER OF THE FEDERAL POWER COMMISSION—Filed July 6, 1964

To the Honorable the United States Court of Appeals for the Fifth Circuit:

United Gas Pipe Line Company (United), petitioner herein, respectfully petitions this Honorable Court to review and set aside an order of the Federal Power Commission contained in its Opinion No. 426 issued May 5, 1964, in proceedings titled "Continental Oil Company" and docketed as No. CI63-979.

[fol. 467]

I.

Jurisdiction and Venue

1. United Gas Pipe Line Company is a corporation organized under the laws of the State of Delaware with its principal place of business located in Shreveport, Louisiana.

2. Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717(r), confers jurisdiction on the United States Courts of Appeals to review orders of the Federal Power Commission and provides that venue shall be in that court where

[File endorsement omitted]

the petitioner is located or has its principal place of business.

3. This petition for review is filed within sixty (60) days after July 2, 1964, the date on which petitioner's application to the Commission asking rehearing of its Opinion No. 426 was denied.

II.

The Nature of the Proceeding

This proceeding involves review of a mandatory order issued by the Federal Power Commission requiring United to purchase from Continental Oil Company (Continental), on terms unilaterally fixed by Continental, gas produced in [fol. 468] the Johnson Bayou Field, Cameron Parish, Louisiana. Prior to January 31, 1963, United had purchased this gas under the terms of the bilateral contract with Continental. Dissatisfied with the price contractually agreed to by the parties, Continental cancelled the contract and sought unsuccessfully to sell the gas to other pipeline purchasers and United at a higher price. Unable to obtain a purchaser at the higher price, Continental unilaterally filed the higher price with the Commission and asked the Commission to force United to buy the gas at the higher price.

When Continental gave notice of its cancellation of the contract, United offered to support an application by Continental to the Commission for authority to abandon its sale to United and at the same time United offered to continue buying Continental's gas, at the price and terms contained in the contract Continental had cancelled, until the Commission could act on the abandonment application. United has indicated it is willing to and will buy Continental's gas, at the unilaterally imposed higher price, should it be needed in order for United to deliver the current requirements of its customers.

After hearing, the Commission concluded that United's refusal to accept continuous deliveries of Continental's gas [fol. 469] and to pay therefor the higher price filed by Con-

tinental was an abandonment of the "operation" of facilities and was prohibited by Section 7(b) of the Act without the Commission's prior approval. On this narrow ground, the Commission issued its mandatory order directing and enjoining United to purchase Continental's gas on Continental's terms, including the higher price unilaterally filed by Continental.

The Commission admits "this is a case of first impression". The Commission's decision is an extremely far reaching effort to extend its jurisdiction into areas it has never before sought to control.

III.

Factual Background

On January 22, 1953, Continental and United entered into a contract covering the sale and purchase of gas produced by Continental in the Johnson Bayou Field. That contract specified a rate of 10.797¢ per Mcf after January 31, 1958, and was for a primary term of 10 years from January 31, 1953, provided, that the contract would automatically continue in effect after expiration of the primary term unless either party terminated the contract by giving ninety (90) days prior written notice.

[fol. 470] Continental gave timely notice that it was cancelling the contract as of January 31, 1963. Continental sought to negotiate a new contract for the sale of this gas to Transcontinental Gas Pipe Line Corporation and to United on terms more favorable to Continental, including a higher price. Both Transcontinental and United refused to agree to the contract terms Continental sought.

United advised Continental that it did not need the Johnson Bayou Field gas and that it could and would actively support Continental's application to the Commission to abandon this sale to United. At the same time United offered to continue purchasing the gas on the same terms and conditions as those contained in the contract Continental had cancelled, until the Commission had acted on the abandonment application.

Unable to negotiate a contract with the terms and price it sought, Continental advised United it refused to apply to the Commission for authority to abandon its sale to United and that it would unilaterally file with the Commission the higher price it had sought. On December 28, 1962, Continental filed with the Federal Power Commission a notice that it was unilaterally increasing the rate applicable to Johnson Bayou Field gas to 15.75¢ per Mcf, and it re-
[fol. 471] quested that the increased rate be made effective on and after January 31, 1963. Without taking action on United's formal complaint protesting and asking rejection of Continental's unilateral rate filing, the Commission on January 25, 1963, mailed Continental a form letter accepting the increased rate and making it effective on and after January 31, 1963.

United has not received deliveries of any Johnson Bayou Field gas since January 31, 1963, though it is completely willing to do so at any time the gas is needed to supply the requirements of its customers.

Gas which United purchases from Johnson Bayou Field is transported into Southeast Texas where United sells gas to industries for their own use and to distributors for resale. United's sales in this area are made in direct competition with highly effective unregulated competition from numerous other suppliers, including producers such as Continental, selling gas in intrastate commerce.

IV.

Proceedings Before the Commission

On February 1, 1963, Continental filed a petition with the Commission asking issuance of an order directing United [fol. 472] to show cause why it should not be required to purchase gas from Continental and pay therefor the higher rate unilaterally filed by Continental. United filed an answer to the petition asking that the order not be issued.

On May 1, 1963, the Commission issued an order, not in the language requested by Continental, but requiring

United to show cause "* * * why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental Oil Company from Johnson Bayou Field, Cameron Parish, Louisiana."

United filed its written answer showing cause and a public hearing was convened for June 3, 1963. Texas Eastern Transmission Corporation intervened in the proceeding in opposition to the show cause order.

United appeared at the hearing and offered evidence. The matter was briefed to the Presiding Examiner who issued his decision on October 28, 1963, sustaining United's position and recalling and vacating the order to show cause. Continental appealed to the Commission from the Presiding Examiner's decision, asking that it be reversed, which the Commission did in its Opinion No. 426. Commissioner [fol. 473] Woodward dissented from the majority's holding and would have affirmed the Presiding Examiner. Commissioner Woodward assigned written reasons for his dissent.

The Commission's opinion requires United to purchase Continental's Johnson Bayou Field gas "* * * at Continental's currently effective filed rate, and in volumes consistent with the terms of the previously effective contract."

Advising the Commission by telegram of its intention to apply for a rehearing, United asked a stay of the Commission's order pending action on the application for rehearing. Continental opposed the requested stay, but the Commission rejected Continental's objections and on June 3, 1964, United filed with the Commission an application asking rehearing of Opinion No. 426 and correction of the errors contained therein. In that application United asked that the Commission extend the stay until final completion of judicial review, if the Commission decided the application adversely to United. On July 2, 1964, the Commission

issued its order denying the application for rehearing and refusing to extend the stay as requested by United.

[fol. 474] V.

Grounds Upon Which Relief Is Sought

The Commission erred in ordering United to purchase Johnson Bayou Field gas at the higher rate unilaterally imposed by Continental. In arriving at the erroneous conclusion that it had power and jurisdiction to issue the order, the Commission committed the following errors:

1. The Commission Erred in Basing Its Decision on the Factually Inaccurate and Misleading Assertion It Was Maintaining the Status Quo

Opinion No. 426 is a mandatory order by which the Commission directs and requires United to buy gas on terms unilaterally imposed by Continental. These terms include a new and higher price than United was paying Continental for its gas. The Commission, however, bases its order on the incorrect and misleading assertion that by so ordering the Commission is maintaining the status quo.

On page 8 of its opinion, the Commission refers to the requirements of Section 7(b) of the Act and says:

> "The mandate is clear that absent satisfaction of this test, which cannot be met by mere showing of contract termination, the *status quo* is to continue.
>
> "The absence of power to compel initial purchases does [fol. 475] not refute this conclusion, * * * there is a vast distinction between the power to compel initial actions and the power to compel the continuation of these actions. The reason is obvious: once sales and purchases of gas flowing in interstate commerce begin, the interests of numerous parties become dependent upon their continuation."

But the Commission's order does not maintain the "status quo". Assuming the Commission has power to compel the

continuation of "initial action", the Commission's order fails to do so. If it be true that, once sale of gas begins, the interests of numerous parties become dependent upon its continuation then the Commission has repudiated some of those interests by permitting one party to change the terms of the sale to its advantage and to the detriment of the other parties.

United is perfectly willing to maintain the "status quo", and no order of the Commission is required to force United to continue the "initial actions" it undertook in purchasing Continental's gas. Continental refused to continue the "status quo" and the "initial actions" it undertook, not United. Continental continues to refuse United's outstanding offer contractually to agree to continue those "initial actions". The assertion that its order maintains the status quo is error.

[fol. 476]

2. The Commission Erred in Refusing to Recognize That Having Established Its Rate Ex Parte, Continental Offered Its Gas to United as a Prospective Customer

In its opinion the Commission does not consider United's arguments based on the Mobile and Memphis decisions.* It ignores the portions of those decisions cited by United and arrives at its decision without consideration of the recognized rights of a buyer purchasing at rates established ex parte by the seller. The Commission's holding does violence to the fundamental and well-established principle of law stated in those decisions.

In *Mobile* the Supreme Court stated in the clearest possible terms that the rate-making powers of natural gas companies were no different under the Act from those they possessed in the absence of the Act. Those powers, the court

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* *United Gas Pipe Line Company* v. *Mobile Gas Corp.*, 350 U.S. 332, 100 L. ed. 373; *United Gas Pipe Line Company* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 3 L. ed. 2d 153, 79 S. Ct. 194.

said, are: "to establish ex parte, any change at will, the rates offered to prospective customers; or to fix by contract and change only by mutual agreement, the rate agreed upon with a particular customer."

United argued repeatedly that if Continental has the right to establish ex parte and change at will the rates at which it is willing to sell Johnson Bayou Field gas, that this right necessarily presupposes that the ex parte rates [fol. 477] are "offered" to United as a "prospective customer". As a prospective customer United declined Continental's offered rates because it does not currently need to purchase that gas to serve its customers.

In denying United's application for rehearing the Commission erroneously distinguished the *Mobile* and *Memphis* decisions.

That the Commission has by its opinion conferred on Continental rate-making powers different and more advantageous than those Continental would have possessed absent the Act is certain; and that it has taken from United rate-making powers it would have possessed absent the Act is also certain. The Commission erred in doing both.

The Commission has also erred in its analysis of the *Sunray* decision.* The Commission, while stating that *Sunray* recognizes that obligations between parties, arising out of contract, may be unilaterally altered upon the termination of the contract, failed to take into consideration that the court in the *Sunray* decision cautioned that a producer [fol. 478] availing itself of this right was obligated to continue gas deliveries *only at the buyer's request.*

3. The Commission Erred in Exceeding the Scope of Its Show Cause Order and in Overruling Sub Silentio United's Argument That if a Continuous Flow of Continental's Gas to United's Customers Is Required, It Is Required on the Same Terms at Which It Was Initiated

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* *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392.

The Commission's show cause order directed United to show cause why it should not obtain the Commission's prior approval before "ceasing the operation" of facilities. The Commission's final order goes beyond the scope of the show cause order and requires not only an application to abandon before ceasing operations, but also orders that United shall: (1) purchase gas from Continental; (2) purchase volumes consistent with the contract Continental cancelled; and (3) pay Continental the rate it had unilaterally filed.

United answered the Commission's show cause order by saying it had no intention to abandon operation of its facilities and it pointed out that Continental had unilaterally changed the terms on which it had initiated service to United and that United was doing nothing more than exercising its right as a prospective purchaser not to buy under the ex parte sales arrangement newly imposed by Continental.

[fol. 479] United argued that if the Act required the continuous and uninterrupted flow of gas from Johnson Bayou Field to United's customers, then that obligation rested equally on Continental and United and that Continental could not change the terms thereof unilaterally. United pointed out that the Commission had made no determination that the present or future public convenience and necessity required any change in the terms including the rate on which Continental was authorized to sell this gas and that if continuity of purchasing were required of United then Continental's unilateral action in increasing its rates to United was unlawful. The Commission was asked to reject Continental's unilateral rate filing and clear the way for United to resume purchases on the same basis it had initially undertaken.

Without so much as discussing United's argument, the Commission assumed the lawfulness of Continental's unilateral rate filing and ordered United to accept the more onerous terms. In so doing, the Commission erred.

4. The Commission Erred in Utilizing the Abandonment Section of the Act to Require Purchasing When the Act Otherwise Denies It That Power

Recognizing that it has not the power to require purchas- [fol. 480] ing of gas under Section 7(c) of the Act, the Commission claimed power to require purchasing by reading into Section 7(b) broader powers than granted it by Section 7(c). In doing so, it erred.

The Act did not give the Commission authority to certificate the purchasing of gas. Insofar as United is aware, the Commission has never issued any buyer a certificate to purchase any gas. Indeed, United has sold untold billions of cubic feet of gas to every conceivable type of purchaser and not one purchaser has ever obtained a certificate to purchase that gas.

United did not obtain a certificate to purchase Johnson Bayou Field gas and were it to ask for one today, the Commission would not issue such a certificate because it has no authority to do so under Section 7(c) of the Act.

Having no authority to require the initial purchasing of gas or to regulate the purchasing of gas through the issuance of certificates, the Commission cannot achieve that authority by indirection. Section 7(b) is not broader than Section 7(c), and the Commission cannot require authorization to abandon that which it never had authority to authorize in the first instance.

[fol. 481] Moreover, the Commission erred when it said that Section 7(b) frames the relevant issue in this proceeding not in terms of whether this Commission has power to compel continued purchases, but whether the public convenience and necessity dictate that United cease purchasing. In its show cause order the Commission thought the issue was framed in terms of continued "operation" but in its opinion it sees it framed in terms of a distinction without a difference, that of not compelling continued purchasing but prohibiting the cessation of purchasing.

Section 7(b) makes no reference to either operation or purchasing. The terms do not appear in Section 7(b). The section does not purport to frame any test with reference to whether public convenience and necessity permits pipelines to cease purchasing.

United can and will serve its customers by purchasing Johnson Bayou Field gas if and when it needs it. No sales to customers or facilities have been abandoned by United and nothing more is prohibited by Section 7(b). The Commission has read into Section 7(b) the power to force the purchaser to buy gas on terms unilaterally imposed by the seller. That power is not conferred on the Commission by Section 7(b) and the Commission's efforts to achieve it do violence to the clearly stated and long accepted meaning of Section 7(b).

[fol. 482]

5. The Commission Erred in Holding That United's Action Constituted an "Abandonment" Prohibited by Section 7(b)

The Commission held that United's action in ceasing to flow gas through its Johnson Bayou gathering or field facilities for an indefinite period of time constituted an abandonment of facilities within the meaning of Section 7(b). It also held that ceasing to draw upon gas reserves for an indefinite period of time constituted an abandonment of service with Section 7(b). In so holding, it erred.

The record is clear that United's facilities remain in place, ready to transport gas when and if needed. United has not discontinued or abandoned sales of gas to any of its customers and will not do so. While United could not dedicate Continental's reserves to any markets and the Commission erred in holding that it did, the fact is that the Johnson Bayou Field reserves remain physically attached to United's system and United will readily take Johnson Bayou Field gas, even at the unilaterally imposed higher price, if the gas is needed to continue sales to its customers.

The Commission erred in holding that an intention to abandon facilities and service necessarily follows from the absence of a stated intention to purchase and flow stated volumes on a continuous basis.

[fol. 483]

6. The Commission Erred in Depriving the Pipeline Buyer of Bargaining Strength With the Producer

By its opinion the Commission has told the pipeline buyer that once a producer's gas has been attached to the pipeline system, that the pipeline forfeits all further bargaining strength with the producer.

The Natural Gas Act was never intended to create new and preferential rights in the producers of the natural gas at the expense of the pipeline companies. Nothing in the Act itself or the legislative history of the Act evidences any such intention. The Commission has conferred on the producer a status sought by the seller of any commodity—a guaranteed market on the most favorable terms possible for the seller. In so doing, it erred.

7. The Commission Erred When It Held That United Has the "Right to Receive a Fair Return" and in Depriving United of the Ability to Control Its Costs

Apparently seeking to justify, or render permissible its requirement that United purchase Continental's gas at the higher rates unilaterally filed by Continental, the Commission asserts that United has the "right to receive a fair return" on its net investment in facilities. The obvious implication is that this "right to receive a fair return" is a power or privilege which United can enforce and [fol. 484] that, being assured of a fair return, United has no ground to complain. United has no such right and the Commission erred in holding that it did.

The record reflects that United competes with producers and intrastate pipelines for its markets and that these competitors have been repeatedly successful in taking mar-

kets from United by offering gas at prices lower than United's prices. When United has gone to the Commission to ask its assistance in saving its markets, the Commission has said it has no power to prevent raiding of interstate markets by intrastate sellers.

United can gain a fair return on its net investment, if and only if, it can keep its costs low enough to permit it to keep its markets and to sell its gas at prices which will afford it a fair return. These considerations require business judgment of the highest level, and daily necessitate decisions based upon an evaluation of competition, costs and prospective profits. But the Commission considered none of this in its opinion; it ignored United's problems while rigidly denying to United the power to control its costs.

United's management has concluded that in order successfully to meet competition, it must reverse the trend of its rising gas purchase costs. The Commission has told United that in this instance it cannot do that. Clearly, [fol. 485] the long-range effect of the Commission's new policy of allowing the producers to fix unilaterally the price they will exact for their gas will be disastrous to United. Almost without exception, United's markets are located within reach of existing or potential intrastate sellers. These sellers include producers who have long since evidenced a willingness to sell their gas at prices cheaper than those permitted by the Commission and thereby make successful inroads into United's markets. United cannot meet this problem if it cannot control the prices it pays for gas. The Commission erred in denying United the power to control its costs.

8. The Commission Erred in Issuing a Mandatory Order So Vague and Indefinite That United Does Not Know What Is Required of It

The Commission has ordered United to make purchases of Continental's gas in volumes consistent with the terms of the cancelled contract. The contract specifies no volumes and Continental insists that the volumes to be purchased

are those required by the Louisiana Common Purchaser Act. United must interpret the contract, the Commission's order and Continental's contention, and hazard the risk that its interpretation will prove to be the same as the Commission's.

[fol. 486] Up to the time of the Commission's order United's risk has been that of a civil action if its purchases did not meet with Continental's approval. But that is no longer the case. United is now faced with criminal sanctions if its interpretation is wrong.

United cannot be required to guess at its obligations under these conditions. As in the case of any mandatory injunction, the performance required must be clearly, directly and unequivocally stated in terms that do not require those commanded to interpret and determine for themselves the scope and extent of the required performance.

United does not know the minimum amount of gas it must purchase from Continental in order to comply with the Commission's order. Neither does it know whether Continental must have any minimum quantities of gas available for delivery to United. It does not know whether it is required to take delivery of all gas Continental can deliver to the meter station, and whether it must take the same amount of gas everyday.

United does not know whether Continental must maintain its delivery capacity, or if it is free to do as it wishes so long as it delivers any gas at all.

United does not know whether the Commission does or [fol. 487] does not intend that United's purchase obligations under the cancelled contract be measured by the common purchaser laws of the State of Louisiana, as contended by Continental.

All the foregoing questions were timely raised by United and ignored by the Commission.

United respectfully submits that the Commission has no power under the Natural Gas Act to prescribe any of the specific requirements it omitted from its order and that this omission reflects the Commission's acknowledgment that it has no power to force the purchasing of gas. This

absence of power points up the error in the Commission's attempt to take jurisdiction not given it by the terms of the Act.

9. The Commission Erred in Seeking to Enforce Part of the Contract Cancelled by Continental

To avoid specifying the volume of gas United must purchase from Continental and the other obligations of a producer and pipeline company selling and buying gas, the Commission seized on the expedient of enforcing a part, while rejecting a part, of the contract Continental had cancelled. In seeking to do so the Commission erred, for the contract was nonexistent. It had been cancelled by Continental and consequently has no legal effect. It can fix no [fol. 488] obligations between United and Continental and it can serve as the measure of none. Moreover, the Commission has no judicial authority to enforce contractual obligations in the first place.

Though timely raised by United, the Commission has chosen to ignore all these matters. It has assumed without any basis that it could renew a part of the contract which Continental cancelled in order to measure United's purchase obligations to Continental. In so doing, it has erred.

10. The Commission Erred in Imposing More Onerous Terms on United Without Considering United's Needs and in Taking United's Properties Without Due Process of Law, Including Adequate Compensation

Regulation unilaterally imposed without consideration of the needs of the regulated company is not consistent with the requirements of due process. Continental's unilateral rate increase and the Commission's holding did not take into account United's needs and did not purport to do so. The Commission's order made no provision for recovery by United of the increased costs forced on it. In issuing its order the Commission did not consider whether United

would be able to raise its rates and if it did so whether it would be able successfully to compete with its competitors [fol. 489] and at the same time earn a fair return on its investment in facilities.

There has been no hearing or determination that United is willing and able to comply with the terms of the Act under the newly imposed terms and there has been no hearing and determination that the public convenience and necessity require United to purchase upon the terms unilaterally imposed by Continental.

The Commission's order takes and uses United's properties without due process of law, including the adequate compensation required by the Fifth Amendment of the Constitution of the United States, and in so doing it errs.

11. If the Natural Gas Act Forces United to Purchase Gas on Terms Unilaterally Imposed by the Seller Without Consideration of the Needs of United then the Act Is to That Extent Unconstitutional

If the Natural Gas Act does contain provisions, which United denies, that permit Continental unilaterally to fix the quantities of gas United must buy and the rates it must pay, all without consideration of the needs of United and without making provisions for United to recover the increased costs forced upon it, then the Act is to that extent unconstitutional.

If the Act permits such action, then United's properties have been taken from it and its ability to maintain its [fol. 490] markets and earn a reasonable return have been placed beyond its control. The Act does not contemplate such a taking of property and does not purport to contain any provisions for granting the adequate compensation required by the due process provisions of the Constitution for the taking of property. Indeed, the Natural Gas Act does not guarantee United any market, or any return on its investment in facilities, or freedom from competition from those, including Continental, who would unilaterally fix the price United must pay for gas.

United says that if the Act permits such taking, without provision for adequate compensation, it is to that extent violative of the Fifth Amendment of the Constitution of the United States and therefore unlawful.

VI.

Relief Prayed For

Wherefore, United Gas Pipe Line Company prays that this Court:

(1) cause a copy of this petition to be served upon a member of the Federal Power Commission and that it cause the Federal Power Commission to file with [fol. 491] this Court the record upon which the order complained of was entered, as all required by Section 19(b) of the Natural Gas Act;

(2) review and set aside Opinion No. 426 issued May 5, 1964, by the Federal Power Commission and that it vacate and annul the order contained therein; and

(3) grant petitioner such other and further relief as may be appropriate in the premises.

Respectfully submitted,

Vernon W. Woods, Attorney for United Gas Pipe Line Company.

Counsel for United Gas Pipe Line Company, Wilbert O. Crain, Saunders Gregg, David Klotz, 1525 Fairfield Avenue, Shreveport, Louisiana.

Vernon W. Woods, Willis L. Meadows, P. O. Box 1707, Shreveport, Louisiana.

[fol. 492] *Duly sworn to by C. C. Barnett, jurat omitted in printing.*

[fol. 493] Certificate of Service (omitted in printing).

[fol. 494]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21693

[Title omitted]

AMENDMENT TO PETITION FOR REVIEW—
Filed July 17, 1964

Comes now United Gas Pipe Line Company (United), and respectfully shows:

I.

In its Motion to Intervene, Continental Oil Company (Continental) suggests the possibility of argument over whether United's petition for review permits review of the Commission's Opinion 426-A which denied rehearing of Opinion No. 426. United believes that it does, but to avoid even the possibility of such a procedural issue United amends its original petition for review as follows:

[fol. 495]

II.

United also appeals from the Commission's Opinion 426-A. United assigns as error the Commission's action in Opinion No. 426-A in denying United's application for rehearing, in rejecting the errors United had assigned in its application for rehearing of Opinion 426, in denying the stay requested by United, and in modifying footnote 14 contained in Opinion No. 426.

III.

As modified United adopts and reiterates its original petition for review.

[File endorsement omitted]

Wherefore, United Gas Pipe Line Company prays that this amendment be filed and allowed.

Respectfully submitted,

Vernon W. Woods, Attorney for United Gas Pipe Line Company.

Counsel for United Gas Pipe Line Company, Wilbert O. Crain, Saunders Gregg, David Klotz, 1525 Fairfield Avenue, Shreveport, Louisiana.

Vernon W. Woods, Willis L. Meadows, P. O. Box 1707, Shreveport, Louisiana.

[fol. 496] *Duly sworn to by Vernon W. Woods, jurat omitted in printing.*

[fol. 497] Certificate of Service (omitted in printing).

[fol. 501]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21693

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
May 13, 1965

On this day this cause was called, and after argument by Vernon W. Woods, Esq., for Petitioner, by Jack D. Head, Esq., for Intervenor, Texas Eastern Transmission Corp., by Peter H. Schiff, Esq., Atty., F.P.C., and by Bruce R. Merrill, Esq., for intervenor, Continental Oil Company, was submitted to the Court.

[fol. 502]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21693

UNITED GAS PIPE LINE COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

Petition to Review and Set Aside Order of the Federal Power Commission.

Before Brown and Gewin, Circuit Judges, and Kilkenny,* District Judge.

OPINION—September 8, 1965

BROWN, *Circuit Judge: The question here is* whether on expiration of the underlying gas sales contract with the seller still committed under the Natural Gas Act, the pipeline purchaser may be compelled to take deliveries at unilaterally increased prices until such time as the FPC [fol. 503] approves abandonments. The FPC gave an affirmative answer. We agree and enforce.

Although decision is far from easy, the facts out of which the problem emerges are simple, neither complex nor conflicting.

In January 1953 Producer[1] and Pipeline[2] contracted for the sale and purchase of gas from Producer's Johnson Bayou Field, Louisiana. This contract was for a primary term of ten years from January 31, 1953, and was subject

* Of the District of Oregon, sitting by designation.

[1] Continental Oil Company.

[2] United Gas Pipe Line Company.

to termination after the primary term upon notice by either party. During the term of the contract the specified contractual rate was 10.077¢ per Mcf including tax reimbursement. The contract was filed with the FPC and accepted as Producer's Rate Schedule No. 115. Producer sought and obtained a certificate of public convenience and necessity authorizing the sale of gas to Pipeline in accordance with its filed rate schedule (of which the contract was the embodiment) and commenced initial delivery of gas on January 31, 1955.[3] Pipeline also sought and obtained a certificate of public convenience and necessity authorizing the construction of facilities necessary to take the gas from Continental.[4] Both Producer and Pipeline did in fact con- [fol. 504] struct facilities in Johnson Bayou Field to permit the sale, purchase and taking of such gas. The Johnson Bayou gas comes from two wells completed on Producer's lease in the field. The facilities installed by Producer were more extensive[5] than those of Pipeline.[6] The delivery point of the gas is located at a valve at the juncture of Producer's 2½ inch flow line and Pipeline's 4 inch pipeline. These facilities were used continuously for delivering and taking the gas from the time of initial delivery on January 31, 1953, until Pipeline shut off the valve and ceased taking gas on January 31, 1963.

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[3] Producer was issued a certificate for this sale at Docket G-6949.

[4] Pipeline was issued a certificate by the Commission at Docket G-2818 on February 25, 1955 in United Gas Pipe Line Co., 14 FPC 582, "authorizing the continued transportation of natural gas by [United] in interstate commerce" and authorizing "the construction and/or operation of any facilities used for the transportation or sale of natural gas in interstate commerce" by United. Field facilities are characterized by FPC as "purchase facilities" in its Rules (18 CFR §2.58) and Regulations (18 CFR §157.7).

[5] They comprised approximately 4,400 feet of 2½ inch flow line, two separators and a battery of storage tanks near the separators.

[6] They were 55 feet of 4 inch pipeline leading from Producer's flow line to Pipeline's Mud Lake transmission line, and also a separator and meter station. The initial installation cost was about $7,000.00.

As permitted under the contract, within ninety days prior to the expiration of the primary term of the contract, Producer gave notice to Pipeline of termination of the contract at the end of the primary term. This notice of termination was acknowledged by Pipeline. The contract expired according to its terms on January 31, 1963. Producer's effective rate schedule was not terminated, however.

During the last months of the contractual term, Producer and Pipeline endeavored to negotiate a new contract. These negotiations were unsuccessful. In brief, Pipeline's position was essentially an offer to extend the old contract either on a relatively long-term basis at the same price and other terms, or on a day-to-day basis at the same price [fol. 505] and other terms. Producer sought a new long-term contract with an increased price reaching 18.75¢ mcf but within the range of the applicable current South Louisiana price level under General Policy No. 61-1 for "old" gas. When negotiations broke down, Pipeline advised Producer that it did not need the gas, and that it would support an application by Producer for abandonment of the certificate. Producer declined and gave the notice of termination.

After giving notice of termination, Producer filed in December 1962 a notice of change in rate pursuant to §4(e) effectuating a unilateral change in rate under its Rate Schedule No. 115 effective January 31, 1963. This provided for an increased rate to 15.75¢ per mcf including tax reimbursement.[7] Producer's existing rate schedule remained effective and unchanged in all other respects.

FPC accepted the rate change to become effective without suspension. Although Pipeline opposed the filing of the unilateral rate change and unsuccessfully sought rehearing of the approval order, Pipeline did not take timely

[7] This rate did not exceed the applicable area rate level for South Louisiana under AR 61-1. See §2.56, 18 CFR (Cum. Supp. 1964) 2.56.

review of this order. The order permitting the rate increase to become effective thus became final.[8]

On learning of the final order approving the rate increase, Pipeline notified Producer just two days prior to the expiration date (January 31, 1963) that it would not continue to purchase gas from Johnson Bayou Field after [fol. 506] that date. Pipeline did not request permission from FPC to cease operating the facilities used in taking gas or to abandon the service, or the purchase, transmission and resale of Johnson Bayou gas. In accordance with its notice, Pipeline ceased taking the gas on January 31, 1963.

Almost immediately Producer petitioned the FPC to direct Pipeline "* * * to show cause why it should not be required to continue to take deliveries of gas produced * * * in the Johnson Bayou Field * * * at the currently filed and effective rate * * *." Declining this relief, the FPC did direct Pipeline to show cause "why it should not be required to apply for and obtain the permission and approval of the * * * Commission before ceasing the operation of all or any portion of the facilities heretofore operated by [it] to purchase natural gas from" the Producer. After a hearing the Examiner's initial decision dismissed the show cause order, but on review and oral argument, the Commission,[9] by divided vote,[10] in an opinion by Commissioner O'Connor held that the Pipeline's refusal to make any use, for an indefinite time, of the facilities for the purchase of gas constituted an abandonment under §7(b) and it ordered Pipeline to resume purchasing gas at the rate specified in Rate Schedule No. 115.

There was great preoccupation with *cessation*.[11] Undertaking to answer the attacks which are reiterated here by

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[8] Continental Oil Co., 29 FPC 525, 526.

[9] Opinion No. 426; 426A, 31 FPC ——.

[10] The late Commissioner Woodward dissented.

[11] E.g., the question as posed by the FPC was: "* * * whether the *cessation* of gas purchases with the concommitant nonuse of jurisdictional gas purchasing facilities, where there is no present intent to renew such purchases, constitutes an abandonment within the scope of" §7(b). (Emphasis supplied.)

[fol. 507] the Pipeline[12] and stressing the importance of §7(b),[13] the opinion emphasized that this section "frames the relevant issue, not in terms of whether this Commission has the power to compel continued purchases, but whether the 'public convenience and necessity' dictates that pipe lines *cease* purchasing * * *." (Emphasis the Commission)

But it seems quite clear that the FPC hardly thought that the impact of its decision was any different by casting it in terms of a requirement that permission be obtained to *cease* performance rather than an order *compelling* continuation of an activity. Thus, describing the contention that although the producer must continue to sell while the Pipeline-Purchaser need not buy, as "paradoxical results" to which "we cannot subscribe" the FPC concluded "that if the power to compel the continuation of sales is not to be reduced to mere illusion, the power to *compel* the continuation of purchases must be its correlative." And in ordering Pipeline "to renew the use of these facilities," pending an abandonment proceeding,[14] Pipeline was ordered to make "purchases * * * at * * * [the] currently effective filed rate, and in volumes consistent with the [fol. 508] terms of the previously effective contract."

Stressing that by this decision the FPC "for the first time in the history of the * * * Act orders a pipe line:

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[12] As an ally it is joined by Texas Eastern Transmission Corporation, an intervenor, on both brief and argument.

[13] §7(b) provides:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuancy of service is unwarranted, or that the present or future public convenience or necessity permits such abandonment." 15 USCA §717f(b).

[14] The opinion expressly recognized that the "order is without prejudice to the institution by [the Pipeline] of a formal abandonment proceeding."

(1) to purchase gas; (2) to pay an increased price fixed unilaterally by the seller; and (3) to buy volumes controlled by a cancelled contract," Pipeline levels a broadside attack.

Pipeline takes the flat position that after the expiration of the sales contract, it cannot, under the Act, be compelled to continue purchases. Whether it continues is a volitional action of its own to be determined solely by it and on terms which it deems acceptable. And the FPC may not bring about this unauthorized result by treating discontinuance of gas purchases as an abandonment of physical facilities through which delivery of the gas has previously been effected. Indeed, the argument continues, the Act is so structured that on this eventuality Pipeline is to be considered as a prospective purchaser as to whom the FPC lacks power to prescribe initial rates. Underlying it all is the insistence that the *purchase* of gas is a non-jurisdictional activity and since the FPC may neither grant, not require application, for a certificate, for the purchase of gas, there is nothing the purchaser can abandon when the contract expires on its own terms.

In the analysis of these objections and the infinite variable shadings of them, some steps are easy, some not so of attack and defense are practically the same, each faceasy. And in the process, we see again that the weapons [fol. 509] tion embracing now this, now that, opinion of the Supreme Court.

Although without more we are not so sure just what the effect might be, we have no doubt that the FPC was authorized on this record to conclude that Pipeline's conduct was an abandonment of the physical facilities for delivery of the gas. Of course the facilities being essential to interstate transportation of gas, they were "jurisdictional," *Panhandle Eastern Pipeline Co.* v. *Public Serv. Comm'n of Indiana*, 1947, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128, for which a certificate was both required, §7(c), and issued, §7(e) (see notes 4, 6, *supra*). That these facilities were simple in nature and small in cost is of no con-

sequence. And whatever might be the status of parts of the equipment geographically more removed, it has been plain in this Circuit ever since *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, 266 F.2d 208,[15] that the very last piece which effects the entry of the gas into the interstate stream is jurisdictional and not insulated from regulation by the production and gathering exclusion of §1(b), 15 USCA §717(b). And see *Ben Bolt Gathering Co.* v. *FPC*, 5 Cir., 1963, 323 F.2d 610.

But, Pipeline insists, granting all of this, there has yet been no abandonment either in fact or in law since the facilities remain intact ready for operational use once there is a need for them. The law, however, is hardly that unrealistic. The facilities, it may be assumed, are maintained in good order ready for immediate resumption [fol. 510] of use. But the use is to be on the terms, under the conditions and at the volitional desire of Pipeline. Once dedicated to the public use, the facilities are now withdrawn to the status of private property unburdened of the public interest or public regulation.

But this conclusion does not solve this case. A simple order to resume *use* of the facilities if complied with would, to be sure, resume the flow of gas—even unwanted gas. Further, the receipt of gas would impose, one would think, some character of obligation on the receiver to pay for it, perhaps measured by what it is worth to the receiver—an obligation which, incidentally, Pipeline is willing to bear.[16] But here the order requires that Pipeline

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[15] We there expressly approved J. M. Huber Corp. v. FPC, 3 Cir., 1956, 236 F.2d 550, cert. denied, 352 U.S. 971, 77 S.Ct. 363, 1 L.Ed.2d 324.

[16] Indeed, one might wonder what the position would have been had Pipeline, acquiescing in a mandatory order to resume taking, merely stated that for such gas it would pay such amount as found due by a court judgment in an action brought by Producer for goods sold and delivered. Cf. United Gas Pipe Line Co. v. Tyler Gas Service Co., 5 Cir., 1957, 247 F.2d 681; Tyler Gas Service Co. v. FPC, D.C.Cir., 1957, 247 F.2d 590; Tyler Gas Service Co. v. United Gas Pipe Line Co., 5 Cir., 1954, 217 F.2d 73.

(a) take gas and therefore put facilities to use and (b) pay the rate prescribed unilaterally by Producer. Full recognition of a public duty clearly includes (a) but not necessarily (b).

It is at this point that all of the arguments, theories, and counter arguments, counter theories intertwine to justify a result different from the likely one had each been carefully compartmentalized.

[fol. 511] Thus, one must acknowledge a good deal of force to Pipeline's contention that under *Mobile*[17] and *Memphis*,[18] initial rates are fixed alone by contract[19] and this sales contract having expired, Pipeline's status is that of a *prospective* customer. Thus, the Court declared, the "* * * initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." The rate provisions, the Court went on, simply define and implement "* * * the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more." Recognizing that a gas company under the Act may make, and change, contract rates, the Court summarizes this as the power "* * * to establish ex parte, and change at will, the rates offered to *prospective* customers; or to fix by contract, and change only by mutual agreement the

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[17] United Gas Pipe Line Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373.

[18] United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 1958, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153.

[19] Of course even the most intransigeant anti-regulation-purist must recognize that this absolute, like most, is also unabsolute. For the right to fix the initial price is of little value unless the sale is certificated thereby bringing into play the FPC's awesome power to reject out-of-line prices under *CATCO* (Atlantic Refining Co. v. Public Service Commission, 1959, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312), condition a temporary, FPC v. Hunt, 1964, 376 U.S. 515, 84 S.Ct. 861, 11 L.Ed.2d 858, 886, reversing, 5 Cir., 1962, 306 F.2d 334, or perhaps even a permanent, Callery Properties, Inc. v. FPC, 5 Cir., 1964, 335 F.2d 1004, cert. granted, 1965, —— U.S. ——, —— S.Ct. ——, 13 L.Ed.2d 820.

rate agreed upon with a particular customer." 350 U.S. 332, 343.

To this the Pipeline can add the further weighty argument that the Act is carefully limited. Speaking of §1(b), the Court early said, this "section determines the Act's [fol. 512] coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern Pipeline Co.* v. *Public Serv. Comm'n of Indiana,* 1947, 332 U.S. 507, 516, 68 S.Ct. 190, 92 L.Ed. 128. There is in the Act no provision that a purchaser must, or even may, obtain a certificate to purchase gas. Its duties *vis-a-vis* a seller-producer are therefore solely a matter of the contract,[20] all such duties evaporating once it is extinguished.

But sound as all this literally may be, it does not reckon with the continuing obligation of the Producer-seller over and beyond the contract period even to the point of exhaustion of reserves. Paraphrasing *CATCO,* the Court in *Sunray* (see note 23, *infra*) described the situation:

> "• • • An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no [fol. 513] withdrawal of that supply from continued

[20] The Pipeline carefully disclaims any right to take unilateral non-FPC approved action during the life of the contract. It never quite says why—because the contract, as a contract, is binding and independent action would be fruitless? or because by virtue of the Act performance under the contract generates, or releases, legal power in the FPC to regulate purchasers as well as seller for the duration?

interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself.' 360 U.S. at 389." [21]

Of course, as a matter of *contract,* the seller-producer volitionally intends to sell for the life of the contract only. Likewise, as a matter of contract, the purchaser volitionally intends to buy for that period only. But whether the conceptual approach is that of Austin or of Blackstone,[22] the fact now is, as revealed by *Sunray*[23] and *Sun,*[24] both seller and buyer have to recognize, whether they know it or not, that the Act imposes a continuing obligation on the seller. If—and there is no real if—the Act imposes obligations beyond[25] the contract as to one party in order to achieve the aim of the statutory scheme, it hardly makes sense in the divination of congressional purpose to assume that only one side of the transaction was to be subject to immediate, continuous, and perpetual obligation and regulation.

[fol. 514] It is not forbidden judicial legislation to give Congress credit for desiring symmetry. Many signs point

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[21] 364 U.S. 137 at 156.

[22] Linkletter v. Walker, 1965, —— U.S. ——, —— S.Ct. ——, 14 L.Ed.2d 601, 604-05 reversing, 5 Cir., 1963, 323 F.2d 11.

[23] Sunray Mid-Continental Oil Co. v. FPC, 1960, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623.

[24] Sun Oil Co. v. FPC, 1960, 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639, affirming, 5 Cir., 1959, 266 F.2d 222. In many ways this case transcends *Sunray.* For in *Sun* the question was not power to grant unlimited certificates, but whether the producer-seller was restricted to the old price under the expired contract.

[25] We are dealing, of course, with the statutory obligation, rights, etc. Consequently, the fact that Congress as it did by the proviso of §5(a) puts limits, or even prohibitions, on the exercise of regulatory power does not demonstrate an absence of a purpose to regulate.

in that direction. One surely is the fact that regulation of long line transmission-pipeline purchases or carriers was a principal object of the Act to bridge the gap between permissible and nonpermissible local, state regulation. *FPC* v. *Hope Natural Gas Co.*, 1944, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333. And *Mobile* articulated what our own abundant exposure to the endless list of post-*Phillips* fall-out[26] cases teaches us, that contracts for the purchase of gas, usually long term and oftentimes in express terms of dedication of reserves, underlie the whole intricate structure of transcontinental lines.[27] What is so vital to financiers, entrepreneurs, and the FPC initially hardly becomes less so as the years go by. A marker in the opposite direction is, of course, congressional rejection in 1938 of proposals that the Act expressly identify purchasers as a category for regulation.[28] But there are ample reasons

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[26] Phillips Petroleum Co. v. Wisconsin, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035.

[27] See, e.g., 18 C.F.R. §157 and particularly §157.14(10):

"Exhibit H—Total gas supply data. A statement of the total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and the services proposed, together with:"

(i) estimated proven reserves in place
(ii) estimated proven reserves available by fee or lease
(iii) gas purchase contracts
(iv) deliverability study
(v) conformed copy of each gas purchase contract
(vi) Btu content estimate
(vii) maps showing location, proven limits, acreage, gas volume, pipelines to be utilized
(viii)
(ix) study of proposed gas storage fields.

[28] Pipeline's brief points out that while Congress was considering the passage of the Natural Gas Act, a bill (HR 5711 and S 1919, 75th Cong. 1st Sess.) was introduced in both houses of Congress on March 17, 1937, which provided that "this Act shall apply to the procurement of natural gas for the purpose of its transmission through pipe lines and its sale, exchange, transmission, or

[fol. 515] to dispel any apparent inconsistency. A major factor may well have been a confidence that with the regulation prescribed including that on producer sales,[29] the public interest was adequately guarded under a scheme which simultaneously gave gas purchasers sufficient freedom of choice since it was—and still is for that matter—the sole volitional decision to *purchase* initially that subjects seller and buyer to duties transcending the contract. The buyer, as much as the seller, sets the machinery in motion.

Pipeline, far from fleeing before *Sunray*, urges strenuously that the Court inescapably envisioned the reverse situation—the one presented here—and predetermined that the purchaser is free to take or not to take or to take on its own terms. Pipeline finds this in the Court's emphasis on the elective nature of the buyer's actions. Thus, the Court stated, "During its term, both parties are bound by it to the same extent as any members of this regulated industry. When it expires, [seller], to be sure, will be under an obligation to continue to deliver gas to United [purchaser] on the *latter's request* unless it can justify an abandonment before the Commission * * *." This is repeated, so it is urged, in the analysis of the newly declared Act-imposed, post-contract duties of the seller. The [fol. 516] seller "* * * will be free then, as it was not free during the contract term * * * to make rate changes under §4 without [purchaser's] consent. It is said that [seller] will be in a position of inequality, because it must supply gas then to United [purchaser] without a corresponding obligation on United to take it." Especially is this so since

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distribution in interstate commerce * * *." The provisions of this bill, however, failed of adoption; instead Congress enacted Section 1(b) with its specific exemptions from the coverage of the Act. Cognizance was taken of this in FPC v. Panhandle Eastern Pipeline Co., 1949, 337 U.S. 498, 513 n. 16, 69 S.Ct. 1251, 93 L.Ed. 1499.

[29] This 1938 congressional purpose was discerned in 1954. Phillips Petroleum Co. v. Wisconsin, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035.

the pressures on the buyer are not those of the Act, but rather of the market place. For this the text is found in these words. "But United, subject to the Act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under Mobile, it may be discovered that each side has its bargaining strength."

We do not believe the Court had any such purpose, but fortunately if what we say it said is not what it said, the instant case affords the vehicle for resolution, 28 USCA §1254. First, the Court was analyzing again the *Mobile-Memphis* concept of integrity of contract. Next, it was dealing with the obligation of the seller-producer, not the purchaser. Also, one of the emphasized statements from the Court's opinion follows on the heels of the ambiguous phrase "it is said" as though, perhaps, the Court was seeking to answer an argumentative contention, not canvass factors or declare legal principles.

But we would not approach it so narrowly. We think that in at least two respects, the opinion in *Sunray* necessarily contemplates that the purchaser is subject to the restraints of the Act after the expiration of the sales contract. There is, first, the Court's consideration of the resulting [fol. 517] predicament if expiration of the contract were held to extinguish the regulatory power of the FPC. Such a result, it pointed out, would bring into operation the right of the seller, as a part of a new certificate, to file rates for the "new" service under §4(c). This would leave the FPC with nothing but the awkward, time-consuming and reverse burden of proof of a §5 proceeding. But if the seller were still obligated, the Court went on, "• • • the rates to be charged under a new contract or otherwise would have to be filed as rate changes under §4(d) of the Act, with 30 days' notice to the commission and the public." This would permit not only suspension, §4(e), but at the hearing the seller "• • • would have to shoulder the burden of proving that its new rates were just and reasonable."

This led the Court to conclude, "* * * Clearly, the rate change provisions of §§4(d) and 4(e), rather than the 'inital rate' provisions of §4(c), are better tailored to the situation that exists when an initial contract of sale of natural gas terminates, and the supply of gas continues." Unlike a really "new" service as to which "* * * the protective provisions of §§4(d) and (e) * * * are not relevant," this is "not the case where one sales contract expires and service continues" for in that event, "the protective provisions fit as well as they do in the case of a rate change made pursuant to a contract, during its term." 364 U.S. 137, 144-147.

But more direct was the Court's consideration of the term "service" as used in §7(b) and §7(e). The Court's analysis followed these steps. First, "* * * under §7(e) the Commission is authorized to issue a certificate authorizing the 'service' covered by the application as well as a [fol. 518] 'sale.'" Next, §7(c) sets "forth no specific antecedent for the 'service' to which §7(e) refers." Consequently, "it might well be thought that one who 'engage[s] in the transportation or sale of natural gas,' which §7(c) does refer to, is performing a 'service' within the meaning of §7(e). Certainly there is no more likely antecedent in §7(c)." Added proof was found in §7(e) and its certification requirement of a dual finding "that the applicant is willing and able 'to do the acts and perform the service proposed.'" Consequently, the Court declares, "§7(e) itself gives positive indication that the 'service' which the Commission's certificate may authorize is something quite apart from simply the specific sales which §7(c) forbids without a certificate sufficient to authorize them. * * *."[30] 364 U.S. 137, 144, 146-7.

Blending these two approaches—(1) reliance on §4(d) and (e) and (2) "service" encompassing "sale" and vice

[30] See also 364 U.S. at 162-166, Justice Harlan dissenting, recognized that service did encompass things other than sales or transportation, and that the obligations of a pipeline are continuing and not limited by contract.

versa—it is inconceivable that the Court could have been treating the seller as subject to awesome regulation at a time the other necessary party to the activity was scot free. Thus, for example, under the structure of §4, a certificated seller may charge only the filed rates. Using, as *Sunray* requires, §4(d) and (e), the FPC must determine the "lawfulness" of the rate, whether suspended or not, since all rates—initial under §4(c) or changes under §4(d) and (e)—must meet the "just and reasonable" standard of §4(a). It is incongruous to suppose that the regulatory agency charged by Congress with achieving the objectives of this legislation is to fulfill this role by a per-[fol. 519] functory stamp of approval on a rate submitted by a seller under the pressure of a freewheeling and independent purchaser on a take-it-or-leave-it basis. And since, for §7 purposes, "service" includes "sale" and vice versa, each of the two parties to a sale—seller and purchaser—necessarily are performing that kind of service. The purchaser's part in a sale, certainly of gas, is vital. It must take it and it must pay for it. And equating "service" with "sale", it, like the seller, has an obligation both to (a) take and (b) pay that transcends the contract.

This discussion of *Sunray* demonstrates, we think, that Pipeline is incorrect in urging that without certification of the purchase or certificating the purchaser there is no duty of one subject to the Act to obtain FPC permission before abandonment of one side of the jurisdictional sale. The "service" is rendered by seller and buyer, and each must serve on until excused under §7(b).

Other things likewise point away from the proposition that the FPC's power to require abandonment is equated with the power initially to certificate. As the brief for the FPC points out as originally enacted in 1938, certification was required only for a proposed entry into an area already served.[21] The legislative history reflects a con-

[21] This was amended 1942. 56 Stat. 83. See FPC v. Texaco, Inc., 1964, 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112.

gressional awareness of the need for an effective abandonment procedure.[22]

[fol. 520] The price to be paid for gas is important. Indeed, in most of the cases, this seems to be the predominant factor. But the supply of gas is equally important. *Callery Properties* v. *FPC*, 5 Cir., 1964, 335 F.2d 1004, 1012-13, cert. granted, 1965, ... U.S. ....., ... S.Ct. ....., 13 L.Ed.2d 820. And it is for the FPC, at least initially, to strike the balance on price and supply in fulfilling its statutory role in determining whether the gas "is or will be required by the present or future public convenience and necessity," §7(e). Withdrawal of gas from the interstate market which the producer is mandatorily required to make available because the purchaser, for its own economic reasons, concludes the price is too high shifts from the governmental agency to a private interested party the determination of this critical problem of the needs of the public, not alone for today, but for the explosive tomorrow. *Detroit & Cleveland Steamship Co.* v. *United States*, 1945, 326 U.S. 236, 66 S.Ct. 75, 90 L.Ed. 38.

Holding, as we do, that the FPC has the power and the duty to require that it approve any abandonment of this service by Pipeline, we can briefly dispose of the remaining contentions.

Although it is probable that the impression comes from Pipeline's arguments designed to show that the FPC on brief and argument here is attempting to confine the issue to the necessity for a §7(b) permission to *cease* purchasing of gas rather than the intrinsic question of an order affirmatively requiring taking of gas at an increased unilateral rate, there is a possible suggestion that the issues were inadequately defined from a procedural standpoint.

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[22] See, e.g., hearings on H.R. 11662, 74 Cong. 2d Sess., at p. 92; the House Committee rejected a proposal that abandonment be allowed "without obtaining such permission, approval or finding, if service is not thereby impaired or if substitute facilities will be installed." See hearings on H.R. 4008 before House Committee on Interstate and Foreign Commerce, 75 Cong. 1st Sess. at p. 127.

[fol. 521] We think there is nothing to this. All parties were fully informed of what was at stake.

Objections that the record evidence does not justify the FPC's implied conclusion that the order under attack is needed to preserve the status quo are really premature. All that the order holds is that pending determination on Pipeline's application for a §7(b) abandonment, Pipeline must continue to take and pay the only outstanding (and hence lawful) rate. The FPC for ample reason declined to consider the intrinsic merits of that problem until the abandonment application is filed.

This likewise takes care of Pipeline's assertion that this is an unconstitutional deprivation of its property without due process. All of these issues bearing upon Pipeline's need, the public's need, the reasonable need so far as price is concerned are all matters for consideration in the abandonment proceeding. For all we know, once the FPC's power is established as it is done here, Pipeline may find itself now surrounded by energetic local distributor intervenors as new allies urging the FPC to require abandonment because the Producer's rate is too high. See, *United Gas Improvement Co.* v. *Continental Oil Co.; FPC* v. *Marr,* 1965, ... U.S. ....., 85 S.Ct. ....., 14 L.Ed.2d 466, reversing 5 Cir., 1964, 336 F.2d 320. The FPC may be persuaded and confiscation will also evaporate.

This leaves only the tag end that the order, authorizing a unilateral change in increase in rates, holds the Pipeline's feet to the fire as to the other terms and conditions [fol. 522] of the expired contract. To the extent that this really presents a problem, it, too, can be the subject of a factual inquiry and conditional order on the abandonment proceedings.

Order Enforced.

[fol. 524]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21693

UNITED GAS PIPE LINE COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL POWER COMMISSION.

Before: Brown and Gewin, Circuit Judges, and Kilkenny,* District Judge.

JUDGMENT—September 8, 1965

This cause came to be heard on the petition of United Gas Pipe Line Company, for review of Order of the Federal Power Commission, issued on May 5, 1964, in Docket No. CI63-979, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the Order of the Federal Power Commission in this cause be, and the same is hereby, enforced.

Issued as Mandate: Oct 18 1965

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* Of the District of Oregon, sitting by designation.

[fol. 525] [File endorsement omitted]

[fol. 526]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,693

[Title omitted]

PETITION OF UNITED GAS PIPE LINE COMPANY FOR REHEARING OF DECISION OF SEPTEMBER 8, 1965—FILED SEPTEMBER 27, 1965

United Gas Pipe Line Company, petitioner, respectfully petitions the Court to grant a rehearing of the decision entered herein on September 8, 1965, and asks that upon rehearing the Court correct its decision and set aside the opinion and order of the Federal Power Commission complained of in this proceeding. The grounds relied on for rehearing are as follows:

I.

The Court erred in adopting as its own the argument that, because the Act imposes a continuing obligation on the seller to sell gas, it does not make sense to assume the buyer is free of a continuing obligation to buy gas. [fol. 527] The Act grants differing rights to seller and buyer in conformity with the differing obligations of seller and buyer. The Court erred in ignoring those differences and in assuming the Act could not conceivably impose a continuing obligation to sell (while granting adequate safeguard rights to the seller) and not at the same time impose a continuing obligation to buy (without such rights).

II.

The Court erred in holding that holdings in *Mobile*[1] and *Memphis*[2] (that natural gas companies have the right to contract as to rates, including the right of the buyer to reject as a prospective customer the unilateral rates of the seller) were nullified by the decisions in *Sunray*[3] and *Sun.*[4]

III.

The Court erred in its assessment of a pipeline buyer's obligations under the Act. They include the duty to deliver to its customers only those natural gas reserves the pipeline had contracted to purchase and the Act does not give the Commission power to force the pipeline to buy other reserves.

[fol. 528]

IV.

If the Act requires that petitioner must buy Continental's gas, which petitioner has denied, then the Court erred in holding that petitioner must buy it on Continental's terms.

V.

Petitioner again urges upon the Court the errors pointed out in petitioner's petition of appeal and briefs, as showing the errors this Court itself makes in affirming the order of the Commission.

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[1] *United Gas Pipe Line Company* v. *Mobile Gas Corp.*, 340 U.S. 332, 100 L. ed. 373.

[2] *United Gas Pipe Line Company* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 3 L. ed. 2d 153.

[3] *Sunray Mid-Continent Oil Company* v. *F.P.C.*, 364 U.S. 137.

[4] *Sun Oil Company* v. *F.P.C.*, 364 U.S. 170.

Wherefore, petitioner prays that rehearing be granted and judgment entered as prayed for in petitioner's petition of appeal.

Respectfully submitted,

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Counsel for United Gas Pipe Line Company, Wilbert O. Crain, Saunders Gregg, David Klotz, 1525 Fairfield Avenue, Shreveport, Louisiana.

Wilkinson, Lewis, Woods & Carmody, P. O. Box 1707, Shreveport, Louisiana.

[fol. 529] Certificate of Service (omitted in printing).

[fol. 543]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,693

[Title omitted]

Before Brown and Gewin, Circuit Judges, and Kilkenny,* District Judge.

ORDER DENYING PETITION FOR REHEARING—October 8, 1965

PER CURIAM:

It is Ordered that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby Denied.

[File endorsement omitted]

[fol. 544] Clerk's Certificate to foregoing transcript (omitted in printing).

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* Of the District of Oregon, sitting by designation.

[fol. 545]

SUPREME COURT OF THE UNITED STATES

No. 870—October Term, 1965

UNITED GAS PIPE LINE COMPANY, Petitioner,

v.

FEDERAL POWER COMMISSION, et al.

ORDER ALLOWING CERTIORARI—February 28, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. ~~870~~ 49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED GAS PIPE LINE COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LECONTE, SHREVEPORT, LOUISIANA

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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED GAS PIPE LINE COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United Gas Pipe Line Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on September 8, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, infra, page 1a - 22a, is reported at 350 F. 2d 689. The opinion and order of the Federal

Power Commission (R. 395-416) is reported at 31 FPC 1079, and the opinion of the Federal Power Commission denying rehearing (R. 459-465) is reported at 32 FPC 8.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1965 (Appendix B, infra, page 23a). Petition For Rehearing was denied by order issued October 8, 1965 (Appendix C, infra, page 24a). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Does the Natural Gas Act authorize the Commission to require a pipeline company, without its consent, to purchase gas and pay therefor the price established ex parte by the seller under circumstances where the seller has cancelled the contract under which purchases had been made and filed with Commission a higher price for the gas than that contained in the cancelled contract?

2. If so, is the Act to that extent unconstitutional as violative of the due process requirements of the Fifth Amendment to the Constitution of the United States?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act [Sections 1(b), 7(b), 7(c) and 7(e), 52 Stat. 821, as amended, 15 U.S.C. 717-717W] are set out in Appendix D, infra, pages 25a - 27a.

STATEMENT

United Gas Pipe Line Company (United) is a natural gas transmission company and Continental Oil Company (Continental) is a producer of natural gas.

In 1953 United and Continental entered into a written contract covering Continental's sale to United of gas produced in the Johnson Bayou Field in Cameron Parish, Louisiana. The contract contained fixed rates, plus provision for tax reimbursement by the buyer (R. 191, 195); it was for a primary term of 10 years from January 31, 1953 (R. 196); and it provided that the contract would continue in effect after expiration of the primary term, unless terminated by either party upon 90 days prior written notice (R. 196).[1]

In order to receive Johnson Bayou Field gas into its existing transmission system, United constructed and placed in operation a separator, a meter station and 55 feet of 4-inch line (R. 397).[2]

In October 1963, Continental gave United notice that it was terminating the contract at the end of the primary term (R. 13) and sought to negotiate a new contract with United containing higher prices (R. 14). United

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(1) Continental filed this contract with the Commission (R. 397) and was issued a related certificate of public convenience and necessity on January 4, 1956. (15 FPC 1650).

(2) United was issued a related certificate of public convenience and necessity on February 25, 1955 (14 FPC 582).

was not agreeable to paying the higher prices but offered to continue purchasing at the existing price. Agreement could not be reached and United offered to support an application by Continental to the Commission for abandonment of Continental's certificate to sell (R. 15), and it offered to continue buying at the existing rate until the Commission acted on the abandonment application (R. 15). Continental declined to apply for an abandonment of its certificate, and it rejected United's offer to buy (R. 16).

Continental then filed with the Commission an increased rate and gave notice that the rate would become effective upon termination of the contract (R. 17).

United gave Continental notice it would discontinue receipt of Johnson Bayou Field gas after January 31, 1963, the date Continental's increased price would become effective (R. 19). Continental complained to the Commission, the Commission directed a show cause order to United, and a hearing was held. United's evidence was that it had not discontinued deliveries to any of its customers (R. 20); that it had not removed or altered any of its facilities (R. 21); and that it was not willing to incur the increased cost demanded by Continental because United was experiencing severe competition from intrastate suppliers, having already lost very substantial markets in Texas and Louisiana to such competition (R. 21).

Without considering any other evidence, the Commission found there had been a cessation of gas flows through United's Johnson Bayou facilities and held this

constituted an abandonment of "jurisdictional purchase facilities" (R. 406-407) without the Commission's prior approval granted under Section 7(b). Insisting that the power to authorize abandonment of facilities under Section 7(b) necessarily implied existence of power to order the purchasing of gas at rates fixed ex parte by the seller, the Commission ordered United to purchase Johnson Bayou Field gas in volumes consistent with the cancelled contract and to pay the higher price Continental had established ex parte (R. 408).

"Not so sure just what the effect might be" of the Commission's conclusion that United had abandoned physical facilities, the reviewing court affirmed the Commission's order on the basis of its view that Section 7(b) applied to the buyer as well as the seller in a "jurisdictional sale" and that both must obtain Commission approval before terminating the transaction. The court held that in this case there was no rate other than Continental's ex parte established rate, and that consequently United had no choice but to pay it until granted abandonment authorization pursuant to Section 7(b).

REASONS FOR GRANTING THE WRIT

With the decision below the Commission has, for the first time in the history of the Act, assumed to require the purchasing of gas and the payment therefor of a price fixed ex parte by the seller. The decision unlawfully extends the Commission's jurisdiction, and it adversely affects the public.

Until this decision, both the Commission and the industry have acted on the assumption that the purchaser's obligations to buy were solely those to which he had agreed contractually. Never before has any purchaser been required to obtain authorization under Section 7(b) to stop purchasing gas; and never before has Section 7(b), or any other section of the Act, been relied on to compel a purchaser to pay an increased price for gas established ex parte by the seller.

The decision below withdraws from the buyer his bargaining strength and denies him control over the price he will pay for gas. It renders the buyer's resale of gas at contractually fixed prices economically ruinous. And in areas of vigorous market competition from intrastate suppliers, including Texas, Louisiana and Mississippi in which United operates, it destroys the interstate pipeline's ability to control its costs in competing for local markets. The decision distorts the Act, it seriously damages pipeline purchasers, and it will result in higher gas prices to the public. In addition, it conflicts in principle with the decisions in *United Gas Pipe Line Company v. Mobile Gas Corp.*, 350 U.S. 332, and *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137.

1. *The Act Does Not Regulate Purchasing.* In common with the plan of utility regulatory statutes in general, the Act regulates the sale and not the purchase of gas. Legislative history shows that Congress considered and rejected a bill to bring purchasing of gas by pipelines

under the Commission's control.[3] In stating the reach of the Commission's jurisdiction, Section 1(b) does not include purchasing. In granting the Commission power to require and issue certificates of public convenience and necessity, Sections 7(c), and 7(e) do not require or permit issuance of certificates to purchase. And in requiring prior Commission approval for abandonments, Section 7(b) does not mention or include purchasing. Clearly, the decision below is grossly in error in extending the Commission's regulatory control to purchasing.

2. *The Act Permits The Buyer To Reject A Seller's Ex Parte Established Price.* In requiring United to pay the seller's ex parte established price, the decision below conflicts in principle with this court's decision in *United Gas Pipe Line Company v. Mobile Gas Corp.*, 350 U.S. 332, and in *United Gas Pipe Line Company v. Memphis Light, Gas & Water Division*, 358 U.S. 103.

In *Mobile*[4] this court held:

"All of the relevant provisions of the Act can thus be fully explained as simply defining and implement-

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(3) While Congress was considering the passage of the Natural Gas Act, a bill (HR 5711 and S 1919, 75th Cong. 1st Sess.) was introduced in both houses of Congress on March 17, 1937, which provided that "this Act shall apply to the procurement of natural gas for the purpose of its transmission through pipe lines and its sale, exchange, transmission, or distribution in interstate commerce * * *". The provisions of this bill, however, failed of adoption; instead Congress enacted Section 1(b) with its specific exemptions from the coverage of the Act. Cognizance was taken of this in *FPC v. Panhandle Eastern Pipeline Co.*, 1949, 337 U.S. 498, 513 n. 16, 69 S. Ct. 1251, 93 L. Ed. 1499.

(4) 350 U.S. at page 343.

> ing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more. * * * The obvious implication is that, except as specifically limited by the Act, *the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish ex parte, and change at will, the rates offered to prospective customers;* or to fix by contract, and change only by mutual agreement the rate agreed upon with a particular customer."(5) (Emphasis ours)

Having established its rate ex parte and without the buyer's assent, the seller could do no more than offer it to United as a "prospective customer" as stated above in *Mobile.* While the decision below preserves to the seller the right to fix it rate ex parte, it denies absolutely to the buyer its right to accept the offered rate or to reject it. The decision below thus unlawfully withdraws from the buyer the bargaining and contracting power which *Mobile* recognizes the buyer has.

3. *The Decision Is Contrary In Principle To The Plan Of The Act As Recognized In Sunray.* In *Sunray,* the Commission's power to tender the seller a certificate unlimited as to time was sustained. In doing so the court pointed out that upon expiration of the term of a limited certificate the seller would have been free to discontinue sales without seeking abandonment authorization under

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(5) This holding was repeated in *Memphis,* 358 U.S. at page 110

section 7(b).[6] Thus the holding in *Sunray* was: (1) that acceptance of an unlimited certificate to sell imposed an obligation on Sunray to sell after expiration of its sales contract; and (2) that continued existence of the certificate was the necessary prerequisite to the application of Section 7(b) after expiration of the sales contract. United has no certificate to purchase Johnson Bayou Field gas, and the Act does not authorize issuance of such a certificate. In this case, as in *Sunray*, absence of a certificate means: (1) United is free to discontinue purchases upon expiration of its gas purchase contract; and (2) the prerequisite to application of Section 7(b) does not exist.

In *Sunray* the court noted with particular care that the certificate imposed an obligation on the seller "to deliver gas to United on the latter's request"[7] after expiration of the sales contract, unless seller could justify an abandonment of deliveries to United. This explicit recognition of the permissive nature of the buyer's right, to "request" deliveries, is obviously consistent with the plan of the Act; for the Act (according to *Sunray)* affords the buyer no protection against unilaterally increased rates, other than it does not take from the buyer the right (noted in *Mobile)* to accept or reject as a prospective customer gas offered at rates established ex parte by the seller.

The Act grants the Commission rate "review" power, it does not grant it power to "make" rates to recover any costs including those its order here forces on

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(6) 364 U.S. at page 142.

(7) 364 U.S. at page 155.

United; the Commission has no rate jurisdiction over direct industrial sales; and the Commission has held it is powerless to protect interstate sales against prejudicial intrastate competition. The Act does not permit Continental's ex parte rate to be tested for justness and reasonableness by the needs or earnings of United. Under the plan of the Act United can maintain its markets and earn a fair return to the extent its own business judgement and its own arrangements with its customers permit. While the Act affords United neither protection against the seller unilaterally increasing its rates nor assistance in recovering increased costs, the Act does not take away from United its right to control its costs (by agreement to the rate it will pay for gas) and the decision below errs in holding the contrary.

4. *If The Act Permits Issuance Of The Order, It Is To That Extent Unconstitutional.* The order takes United's property without due process, including adequate compensation, required by the Fifth Amendment to the Constitution of the United States.

The Commission's order forceably takes cash from United and gives it to Continental in the form of the increased price demanded and fixed ex parte by Continental. United's private property is thus taken for the private benefit of Continental, without any finding by the Commission that the taking is required for public convenience

and necessity and without any provision for compensation to United for the taking of its property.(8) United stressed to the Commission that the Natural Gas Act does not guarantee United any market, or any return on its investment in facilities, or even protection from discriminatory intrastate competition from those, including Continental, who would unilaterally fix the price United must pay for gas (R. 438). Because United must maintain its markets, and fix its rates to recover its costs and earn a fair return on the basis of its own arrangements with its customers, should the Act expressly permit the Commission to force United to pay Continental its unilaterally increased cost for gas, the Act would be to that extent arbitrary and a denial of due process of law.

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(8) Exercise of the commerce power is subject to the Fifth Amendment. *Currin v. Wallace*, 306 U.S. 1, 14. In *Republic Natural Gas Company v. Oklahoma*, 334 U.S. 62, 99, Mr. Justice Rutledge, joined by Mr. Justice Black, Mr. Justice Murphy and Mr. Justice Burton, dissenting (the majority did not reach the merits) expressed the opinion that forced purchasing required of pipelines under an Oklahoma common purchaser statute(later held constitutional in *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179) did not contravene constitutional guarantees because the statute authorized the state corporation commission to fix the terms of the forced purchasing in such a way as to insure reasonable compensation to the pipeline purchaser.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 21693

UNITED GAS PIPE LINE COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petition to Review and Set Aside Order of the Federal Power Commission.

(September 8, 1965.)

Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

BROWN, Circuit Judge: The qusetion here is whether on expiration of the underlying gas sales contract with the seller still committed under the Natural Gas Act, the

*Of the District of Oregon, sitting by designation.

pipeline purchaser may be compelled to take deliveries at unilaterally increased prices until such time as the FPC approves abandonments. The FPC gave an affirmative answer. We agree and enforce.

Although decision is far from easy, the facts out of which the problem emerges are simple, neither complex nor conflicting.

In January 1953 Producer(1) and Pipeline(2) contracted for the sale and purchase of gas from Producer's Johnson Bayou Field, Louisiana. This contract was for a primary term of ten years from January 31, 1953, and was subject to termination after the primary term upon notice by either party. During the term of the contract the specified contractual rate was 10.077¢ per Mcf including tax reimbursement. The contract was filed with the FPC and accepted as Producer's Rate Schedule No. 115. Producer sought and obtained a certificate of public convenience and necessity authorizing the sale of gas to Pipeline in accordance with its filed rate schedule (of which the contract was the embodiment) and commenced initial delivery of gas on January 31, 1955.(3) Pipeline also sought and obtained a certificate of public convenience and necessity authorizing the construction of facilities neces-

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(1) Continental Oil Company.

(2) United Gas Pipe Line Company.

(3) Producer was issued a certificate for this sale at Docket G-6949.

sary to take the gas from Continental.[4] Both Producer and Pipeline did in fact construct facilities in Johnson Bayou Field to permit the sale, purchase and taking of such gas. The Johnson Bayou gas comes from two wells completed on Producer's lease in the field. The facilities installed by Producer were more extensive[5] than those of Pipeline.[6] The delivery point of the gas is located at a valve at the juncture of Producer's 2-½ inch flow line and Pipeline's 4 inch pipeline. These facilities were used continuously for delivering and taking the gas from the time of initial delivery on January 31, 1953, until Pipeline shut off the valve and ceased taking gas on January 31, 1963.

As permitted under the contract, within ninety days prior to the expiration of the primary term of the contract, Producer gave notice to Pipeline of termination of the contract at the end of the primary term. This notice

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(4) Pipeline was issued a certificate by the Commission at Docket G-2818 on February 25, 1955 in United Gas Pipe Line Co., 14 FPC 582, "authorizing the continued transportation of natural gas by [United] in interstate commerce" and authorizing "the construction and/or operation of any facilities used for the transportation or sale of natural gas in interstate commerce" by United.

Field facilities are characterized by FPC as "purchase facilities" in its Rules (18 CFR §2.58) and Regulations (18 CFR §157.7).

(5) They comprised approximately 4,400 feet of 2-½ inch flow line, two separators and a battery of storage tanks near the separators.

(6) They were 55 feet of 4 inch pipeline leading from Producer's flow line to Pipeline's Mud Lake transmission line, and also a separator and meter station. The initial installation cost was about $7,000.00.

of termination was acknowledged by Pipeline. The contract expired according to its terms on January 31, 1963. Producer's effective rate schedule was not terminated, however.

During the last months of the contractual term, Producer and Pipeline endeavored to negotiate a new contract. These negotiations were unsuccessful. In brief, Pipeline's position was essentially an offer to extend the old contract either on a relatively long-term basis at the same price and other terms, or on a day-to-day basis at the same price and other terms. Producer sought a new long-term contract with an increased price reaching 18.75¢ mcf but within the range of the applicable current South Louisiana price level under General Policy No. 61-1 for "old" gas. When negotiations broke down, Pipeline advised Producer that it did not need the gas, and that it would support an application by Producer for abandonment of the certificate. Producer declined and gave the notice of termination.

After giving notice of termination, Producer filed in December 1962 a notice of change in rate pursuant to §4(e) effectuating a unilateral change in rate under its Rate Schedule No. 115 effective January 31, 1963. This provided for an increased rate to 15.75¢ per mcf including tax reimbursement.(7) Producer's existing rate schedule remained effective and unchanged in all other respects.

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(7) This rate did not exceed the applicable area rate level for South Louisiana under AR 61-1. See §2.56, 18 CFR (Cum. Supp. 1964) 2.56.

FPC accepted the rate change to become effective without suspension. Although Pipeline opposed the filing of the unilateral rate change and unsuccessfully sought rehearing of the approval order, Pipeline did not take timely review of this order. The order permitting the rate increase to become effective thus became final.(8)

On learning of the final order approving the rate increase, Pipiline notified Producer just two days prior to the expiration date (January 31, 1963) that it would not continue to purchase gas from Johnson Bayou Field after that date. Pipeline did not request permission from FPC to cease operating the facilities used in taking gas or to abandon the service, or the purchase, transmission and resale of Johnson Bayou gas. In accordance with its notice, Pipeline ceased taking the gas on January 31, 1963.

Almost immediately Producer petitioned the FPC to direct Pipeline "* * * to show cause why it should not be required to continue to take deliveries of gas produced * * * in the Johnson Bayou Field * * * at the currently filed and effective rate * * *." Declining this relief, the FPC did direct Pipeline to show cause "why it should not be required to apply for and obtain the permission and approval of the * * * Commission before ceasing the operation of all or any portion of the facilities heretofore operated by [it] to purchase natural gas from" the Producer. After a hearing the Examiner's initial decision dismissed the show cause order, but on review and oral

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(8) Continental Oil Co., 29 FPC 525, 526.

argument, the Commission,[9] by divided vote,[10] in an opinion by Commissioner O'Connor held that the Pipeline's refusal to make any use, for an indefinite time, of the facilities for the purchase of gas constituted an abandonment under §7(b) and it ordered Pipeline to resume purchasing gas at the rate specified in Rate Schedule No. 115.

There was great preoccupation with *cessation*.[11] Undertaking to answer the attacks which are reiterated here by the Pipeline[12] and stressing the importance of §7(b),[13] the opinion emphasized that this section "frames the relevant issue, not in terms of whether this Commission has the power to compel continued purchases, but whether the 'public convenience and necessity' dictates that pipe lines *cease* purchasing * * *." (Emphasis the Commission)

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(9) Opinion No. 426, 426A, 31 FPC . . . . .

(10) The late Commissioner Woodward dissented.

(11) E.g., the question as posed by the FPC was: "* * * whether the *cessation* of gas purchases with the concommitant nonuse of jurisdictional gas purchasing facilities, where there is no present intent to renew such purchases, constitutes an abandonment within the scope of" §7(b). (Emphasis supplied)

(12) As an ally it is joined by Texas Eastern Transmission Corporation, an intervenor, on both brief and argument.

(13) §7(b) provides:
"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuancy of service is unwarranted, or that the present or future public convenience or necessity permits such abandonment." 15 USCA§ 717f(b).

But it seems quite clear that the FPC hardly thought that the impact of its decision was any different by casting it in terms of a requirement that permission be obtained to *cease* performance rather than an order *compelling* continuation of an activity. Thus, describing the contention that although the producer must continue to sell while the Pipeline-Purchaser need not buy, as "paradoxical results" to which "we cannot subscribe" the FPC concluded "that if the power to compel the continuation of sales is not to be reduced to mere illusion, the power to *compel* the continuation of purchases must be its correlative." And in ordering Pipeline "to renew the use of these facilities," pending an abandonment proceeding,[14] Pipeline was ordered to make "purchases * * * at * * * [the] currently effective filed rate, and in volumes consistent with the terms of the previously effective contract."

Stressing that by this decision the FPC "for the first time in the history of the * * * Act orders a pipe line: (1) to purchase gas; (2) to pay an increased price fixed unilaterally by the seller; and (3) to buy volumes controlled by a cancelled contract," Pipeline levels a broadside attack.

Pipeline takes the flat position that after the expiration of the sales contract, it cannot, under the Act, be compelled to continue purchases. Whether it continues is a volitional action of its own to be determined solely by

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(14) The opinion expressly recognized that the "order is without prejudice to the institution by [the Pipeline] of a formal abandonment proceedings."

it and on terms which it deems acceptable. And the FPC may not bring about this unauthorized result by treating discontinuance of gas purchases as an abandonment of physical facilities through which delivery of the gas has previously been effected. Indeed, the argument continues, the Act is so structured that on this eventuality Pipeline is to be considered as a prospective purchaser as to whom the FPC lacks power to prescribe initial rates. Underlying it all is the insistence that the *purchase* of gas is a non-jurisdictional activity and since the FPC may neither grant, not require application, for a certificate, for the purchase of gas, there is nothing the purchaser can abandon when the contract expires on its own terms.

In the analysis of these objections and the infinite variable shadings of them, some steps are easy, some not so easy. And in the process, we see again that the weapons of attack and defense are practically the same, each faction embracing now this, now that, opinion of the Supreme Court.

Although without more we are not so sure just what the effect might be, we have no doubt that the FPC was authorized on this record to conclude that Pipeline's conduct was an abandonment of the physical facilities for delivery of the gas. Of course the facilities being essential to interstate transportation of gas, they were "jurisdictional," *Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n of Indiana*, 1947, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128, for which a certificate was both required, §7(c), and issued, §7(e) (see notes 4, 6, *supra*). That these facilities were simple in nature and small in cost is of no

consequence. And whatever might be the status of parts of the equipment geographically more removed, it has been plain in this Circuit ever since *Continental Oil Co. v. FPC*, 5 Cir., 1959, 266 F.2d 208,[15] that the very last piece which effects the entry of the gas into the interstate stream is jurisdictional and not insulated from regulation by the production and gathering exclusion of §1(b), 15 USCA §717(b). And see *Ben Bolt Gathering Co. v. FPC*, 5 Cir., 1963, 323 F.2d 610.

But, Pipeline insists, granting all of this, there has yet been no abandonment either in fact or in law since the facilities remain intact ready for operational use once there is a need for them. The law, however, is hardly that unrealistic. The facilities, it may be assumed, are maintained in good order ready for immediate resumption of use. But the use is to be on the terms, under the conditions and at the volitional desire of Pipeline. Once dedicated to the public use, the facilities are now withdrawn to the status of private property unburdened of the public interest or public regulation.

But this conclusion does not solve this case. A simple order to resume *use* of the facilities if complied with would, to be sure, resume the flow of gas—even unwanted gas. Further, the receipt of gas would impose, one would think, some character of obligation on the receiver to pay for it, perhaps measured by what it is worth to the re-

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(15) We there expressly approved J. M. Huber Corp. v. FPC, 3 Cir., 1956, 236 F.2d 550, cert. denied, 352 U.S. 971, 77 S.Ct. 363, 1 L.Ed.2d 324.

ceiver — an obligation which, incidentally, Pipeline is willing to bear.[16] But here the order requires that Pipeline (a) take gas and therefore put facilities to use and (b) pay the rate prescribed unilaterally by Producer. Full recognition of a public duty clearly includes (a) but not necessarily (b).

It is at this point that all of the arguments, theories, and counter arguments, counter theories intertwine to justify a result different from the likely one had each been carefully compartmentalized.

Thus, one must acknowledge a good deal of force to Pipeline's contention that under *Mobile*[17] and *Memphis*,[18] initial rates are fixed alone by the contract[19]

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(16) Indeed, one might wonder what the position would have been had Pipeline, acquiescing in a mandatory order to resume taking, merely stated that for such gas it would pay such amount as found due by a court judgment in an action brought by Producer for goods sold and delivered. Cf. United Gas Pipe Line Co. v. Tyler Gas Service Co., 5 Cir., 1957, 247 F.2d 681; Tyler Gas Service Co. v. FPC, D.C.Cir., 1957, 247 F.2d 590; Tyler Gas Service Co. v. United Gas Pipe Line Co., 5 Cir., 1954, 217 F.2d 73.

(17) United Gas Pipe Line Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373.

(18) United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 1958, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153.

(19) Of course even the most intransigeant anti-regulation-purist must recognize that this absolute, like most, is also unabsolute. For the right to fix the initial price is of little value unless the sale is certificated thereby bringing into play the FPC's awesome power to reject out-of-line prices under *CATCO* (Atlantic Refining Co. v. Public Service Commission, 1959, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312), condition a temporary, FPC v. Hunt, 1964, 376 U.S. 515, 84 S.Ct. 861, 11 L.Ed.2d 858, 886, reversing, 5 Cir., 1962, 306 F.2d 334, or perhaps even a permanent, Callery Properties, Inc. v. FPC, 5 Cir., 1964, 335 F.2d 1004, cert. granted, 1965, ...U.S....., ...S.Ct....., 13 L. Ed.2d 820.

and this sales contract having expired, Pipeline's status is that of a *prospective* customer. Thus, the Court declared, the "* * * initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." The rate provisions, the Court went on, simply define and implement "* * * the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more." Recognizing that a gas company under the Act may make, and change, contract rates, the Court summarizes this as the power "* * * to establish ex parte, and change at will, the rates offered to *prospective* customers; or to fix by contract, and change only by mutual agreement the rate agreed upon with a particular customer." 350 U.S. 332, 343.

To this the Pipeline can add the further weighty argument that the Act is carefully limited. Speaking of §1(b), the Court early said, this "section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n of Indiana*, 1947, 332 U.S. 507, 516, 68 S.Ct. 190, 92 L.Ed. 128. There is in the Act no provision that a purchaser must, or even may, obtain a certificate to purchase gas. Its duties *vis-a-vis* a seller-producer are

therefore solely a matter of the contract,[20] all such duties evaporating once it is extinguished.

But sound as all this literally may be, it does not reckon with the continuing obligation of the Producer-seller over and beyond the contract period even to the point of exhaustion of reserves. Paraphrasing *CATCO*, the Court in *Sunray* (see note 23, *infra)* described the situation:

> "* * * An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself.' 360 U.S. at 389."[21]

Of course, as a matter of *contract*, the seller-producer volitionally intends to sell for the life of the contract only. Likewise, as a matter of contract, the purchaser volitionally intends to buy for the period only. But whether

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(20) The Pipeline carefully disclaims any right to take unilateral non-FPC approved action during the life of the contract. It never quite says why—because the contract, as a contract, is binding and independent action would be fruitless? or because by virtue of the Act performance under the contract generates, or releases, legal power in the FPC to regulate purchasers as well as seller for the duration?

(21) 364 U.S. 137 at 156.

the conceptual approach is that of Austin or of Blackstone,[22] the fact now is, as revealed by *Sunray*[23] and *Sun*,[24] both seller and buyer have to recognize, whether they know it or not, that the Act imposes a continuing obligation on the seller. If — and there is no real if — the Act imposes obligations beyond[25] the contract as to one party in order to achieve the aim of the statutory scheme, it hardly makes sense in the divination of congressional purpose to assume that only one side of the transaction was to be subject to immediate, continuous, and perpetual obligation and regulation.

It is not forbidden judicial legislation to give Congress credit for desiring symmetry. Many signs point in that direction. One surely is the fact that regulation of long line transmission-pipeline purchases or carriers was a principal object of the Act to bridge the gap between permissible and nonpermissible local, state regulation.

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(22) Linkletter v. Walker, 1965, ... U.S.... , ... S.Ct....., 14 L.Ed.2d 601, 604-05 reversing, 5 Cir., 1963, 323 F.2d 11.

(23) Sunray Mid-Continental Oil Co. v. FPC, 1960, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623.

(24) Sun Oil Co. v. FPC, 1960, 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639, affirming, 5 Cir., 1959, 266 F.2d 222. In many ways this case transcends *Sunray*. For in *Sun* the question was not power to grant unlimited certificates, but whether the producer-seller was restricted to the old price under the expired contract.

(25) We are dealing, of course, with the statutory obligation, rights, etc. Consequently, the fact that Congress as it did by the provisio of §5(a) puts limits, or even prohibitions, on the exercise of regulatory power does not demonstrate an absence of a purpose to regulate.

FPC v. Hope Natural Gas Co., 1944, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333. And *Mobile* articulated what our own abundant exposure to the endless list of post-*Phillips* fall-out[26] cases teaches us, that contracts for the purchase of gas, usually long term and oftentimes in express terms of dedication of reserves, underlie the whole intricate structure of transcontinental lines.[27] What is so vital to financiers, enterpreneurs, and the FPC initially hardly becomes less so as the years go by. A marker in the opposite direction is, of course, congressional rejection in 1938 of proposals that the Act expressly identify purchasers as a category for regulations.[28] But there are ample

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(26) Phillips Petroleum Co. v. Wisconsin, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035.

(27) See, e.g., 18 C.F.R. §157 and particularly §157.14(10):

"Exhibit H—Total gas supply data. A statement of the total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and the services proposed, together with:"

(i) estimated proven reserves in place
(ii) estimated proven reserves available by fee or lease
(iii) gas purchase contracts
(iv) deliverability study
(v) conformed copy of each gas purchase contract
(vi) Btu content estimate
(vii) maps showing location, proven limits, acreage, gas volume, pipelines to be utilized
(viii)
(ix) study of proposed gas storage fields.

(28) Pipeline's brief points out that while Congress was considering the passage of the Natural Gas Act, a bill (HR 5711 and S 1919, 75th Cong. 1st Sess.) was introduced in both houses of Congress on March 17, 1937, which provided that "this Act shall apply to the procurement of natural gas for the purpose of its transmission through pipe lines and its sale, exchange, transmission, or distri-

reasons to dispel any apparent inconsistency. A major factor may well have been a confidence that with the regulation prescribed including that on producer sales,[29] the public interest was adequately guarded under a scheme which simultaneously gave gas purchasers sufficient freedom of choice since it was — and still is for that matter — the sole volitional decision to *purchase* initially that subjects seller and buyer to duties transcending the contract. The buyer, as much as the seller, sets the machinery in motion.

Pipeline, far from fleeing before *Sunray*, urges strenuously that the Court inescapably envisioned the reverse situation — the one presented here — and predetermined that the purchaser is free to take or not to take or to take on its own terms. Pipeline finds this in the Court's emphasis on the elective nature of the buyer's actions. Thus, the Court stated, "During its term, both parties are bound by it to the same extent as any members of this regulated industry. When it expires, [seller], to be sure, will be under an obligation to continue to deliver gas to United [purchaser] on the *latter's request* unless it can justify an abandonment before the Commission * * *." This is repeated, so it is urged, in the analysis

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bution in interstate commerce * * *." The provisions of this bill, however, failed of adoption; instead Congress enacted Section 1(b) with its specific exemptions from the coverage of the Act. Cognizance was taken of this in FPC v. Panhandle Eastern Pipeline Co., 1949, 337 U.S. 498, 513 n. 16, 69 S.Ct. 1251, 93 L.Ed. 1499.

(29) This 1938 congressional purpose was discerned in 1954. Phillips Petroleum Co. v. Wisconsin, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035.

of the newly declared Act-imposed, post-contract duties of the seller. The seller "* * * will be free then, as it was not free during the contract term * * * to make rate changes under §4 without [purchaser's] consent. It is said that [seller] will be in a position of inequality, because it must supply gas then to United [purchaser] without a corresponding obligation on United to take it." Especially is this so since the pressures on the buyer are not those of the Act, but rather of the market place. For this the text is found in these words. "But United, subject to the Act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under Mobile, it may be discovered that each side has its bargaining strength."

We do not believe the Court had any such purpose, but fortunately if what we say it said is not what it said, the instant case affords the vehicle for resolution, 28 USCA§1254. First, the Court was analyzing again the *Mobile-Memphis* concept of integrity of contract. Next, it was dealing with the obligation of the seller-producer, not the purchaser. Also, one of the emphasized statements from the Court's opinion follows on the heels of the ambiguous phrase "it is said" as though, perhaps, the Court was seeking to answer an argumentative contention, not canvass factors or declare legal principles.

But we would not approach it so narrowly. We think that in at least two respects, the opinion in *Sunray* necessarily contemplates that the purchaser is subject to

the restraints of the Act after the expiration of the sales contract. There is, first, the Court's consideration of the resulting predicament if expiration of the contract were held to extinguish the regulatory power of the FPC. Such a result, it pointed out, would bring into operation the right of the seller, as a part of a new certificate, to file rates for the "new" service under §4(c). This would leave the FPC with nothing but the awkward, time-consuming and reverse burden of proof of a §5 proceeding. But if the seller were still obligated, the Court went on, "* * * the rates to be charged under a new contract or otherwise would have to be filed as rate changes under §4(d) of the Act, with 30 days' notice to the commission and the public." This would permit not only suspension, §4(e), but at the hearing the seller "* * * would have to shoulder the burden of proving that its new rates were just and reasonable." This led the Court to conclude, "* * * Clearly, the rate change provisions of §§4(d) and 4(e), rather than the 'initial rate' provisions of §4(c), are better tailored to the situation that exists when the initial contract of sale of natural gas terminates, and the supply of gas continues." Unlike a really "new" service as to which "* * * the protective provisions of §§4(d) and (e) * * * are not relevant," this is "not the case where one sales contract expires and service continues" for in that event, "the protective provisions fit as well as they do in the case of a rate change made pursuant to a contract, during its term." 364 U.S. 137, 144-147.

But more direct was the Court's consideration of the term "service" as used in §7(b) and §7(e). The

Court's analysis followed these steps. First, "* * * under §7(e) the Commission is authorized to issue a certificate authorizing the 'service' covered by the application as well as a 'sale.'" Next, §7(c) sets "forth no specific antecedent for the 'service' to which §7(e) refers." Consequently, "it might well be thought that one who 'engage[s] in the transportation or sale of natural gas,' which §7(c) does refer to, is performing a 'service' within the meaning of §7(e). Certainly there is no more likely antecedent in §7(c)." Added proof was found in §7(e) and its certification requirement of a dual finding "that the applicant is willing and able "to do the acts and perform the service proposed.'" Consequently, the Court declares, "§7(e) itself gives positive indication that the 'service' which the Commission's certificate may authorize is something quite apart from simply the specific sales which §7(c) forbids without a certificate sufficient to authorize them***."(30) 364 U.S. 137, 144, 146-7.

Blending these two approaches — (1) reliance on §4(d) and (e) and (2) "service" encompassing "sale" and vice versa — it is inconceivable that the Court could have been treating the seller as subject to awesome regulation at a time the other necessary party to the activity was scot free. Thus, for example, under the structure of §4, a certificated seller may charge only the filed rates. Using, as *Sunray* requires, §4(d) and (e), the FPC must

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(30) See also 364 U.S. at 162-166, Justice Harlan dissenting, recognized that service did encompass things other than sales or transportation, and that the obligations of a pipeline are continuing and not limited by contract.

determine the "lawfulness" of the rate, whether suspended or not, since all rates — initial under §4(c) or changes under §4(d) and (e) — must meet the "just and reasonable" standard of §4(a). It is incongruous to suppose that the regulatory agency charged by Congress with achieving the objectives of this legislation is to fulfill this role by a perfunctory stamp of approval on a rate submitted by a seller under the pressure of a freewheeling and independent purchaser on a take-it-or-leave-it basis. And since, for §7 purposes, "service" includes "sale" and vice versa, each of the two parties to a sale — seller and purchaser — necessarily are performing that kind of service. The purchaser's part in a sale, certainly of gas, is vital. It must take it and it must pay for it. And equating "service" with "sale", it, like the seller has an obligation both to (a) take and (b) pay that transcends the contract.

This discussion of *Sunray* demonstrates, we think, that Pipeline is incorrect in urging that without certification of the purchase or certificating the purchaser there is no duty of one subject to the Act to obtain FPC permission before abandonment of one side of the jurisdictional sale. The "service" is rendered by seller and buyer, and each must serve on until excused under §7(b).

Other things likewise point away from the proposition that the FPC's power to require abandonment is equated with the power initially to certificate. As the brief for the FPC points out as originally enacted in 1938, certification was required only for a proposed entry into

an area already served.[31] The legislative history reflects a congressional awareness of the need for an effective abandonment procedure.[32]

The price to be paid for gas is important. Indeed, in most of the cases, this seems to be the predominant factor. But the supply of gas is equally important. *Callery Properties v. FPC*, 5 Cir., 1964, 335 F.2d 1004, 1012-13, cert. granted, 1965, ... U.S. ....., ... S.Ct. ....., 13 L.Ed. 2d 820. And it is for the FPC, at least initially, to strike the balance on price and supply in fulfilling its statutory role in determining whether the gas "is or will be required by the present or future public convenience and necessity," §7(e). Withdrawal of gas from the interstate market which the producer is mandatorily required to make available because the purchaser, for its own economic reasons, concludes the price is too high shifts from the governmental agency to a private interested party the determination of this critical problem of the needs of the public, not alone for today, but for the explosive tomorrow. *Detroit Cleveland Steamship Co. v. United States*, 1945, 326 U.S. 236, 66 S.Ct. 75, 90 L.Ed. 38.

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(31) This was amended 1942. 56 Stat. 83. See FPC v. Texaco, Inc., 1964, 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112.

(32) See, e.g., hearings on H.R. 11662, 74 Cong. 2d Sess., at p. 92; the House Committee rejected a proposal that abandonment be allowed "without obtaining such permission, approval or finding, if service is not thereby impaired or if substitute facilities will be installed." See hearings on H.R. 4008 before House Committee on Interstate and Foreign Commerce, 75 Cong. 1st Sess. at p. 127.

Holding, as we do, that the FPC has the power and the duty to require that it approve any abandonment of this service by Pipeline, we can briefly dispose of the remaining contentions.

Although it is probable that the impression comes from Pipeline's arguments designed to show that the FPC on brief and argument here is attempting to confine the issue to the necessity for a §7(b) permission to *cease* purchasing of gas rather than the intrinsic question of an order affirmatively requiring taking of gas at an increased unilateral rate, there is a possible suggestion that the issues were inadequately defined from a procedural standpoint. We think there is nothing to this. All parties were fully informed of what was at stake.

Objections that the record evidence does not justify the FPC's implied conclusion that the order under attack is needed to preserve the status quo are really premature. All that the order holds is that pending determination on Pipeline's application for a §7(b) abandonment, Pipeline must continue to take and pay the only outstanding (and hence lawful) rate. The FPC for ample reason declined to consider the intrinsic merits of the problem until the abandonment application is filed.

This likewise takes care of Pipeline's assertion that this is an unconstitutional deprivation of its property without due process. All of these issues bearing upon Pipeline's need, the public's need, the reasonable need so far as price is concerned are all matters for consideration in the abandonment proceeding. For all we know, once the

FPC's power is established as it is done here, Pipeline may find itself now surrounded by energetic local distributor intervenors as new allies urging the FPC to require abandonment because the Producer's rate is too high. See, *United Gas Improvement Co. v. Continental Oil Co.; FPC v. Marr*, 1965, ... U.S. ....., 85 S.Ct. ....., 14 L.Ed.2d 466, reversing 5 Cir., 1964, 336 F.2d 320. The FPC may be persuaded and confiscation will also evaporate.

This leaves only the tag end that the order, authorizing a unilateral change in increase in rates, holds the Pipeline's feet to the fire as to the other terms and conditions of the expired contract. To the extent that this really presents a problem, it, too, can be the subject of a factual inquiry and conditional order on the abandonment proceedings.

ORDER ENFORCED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1964

No. 21693

UNITED GAS PIPE LINE COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petition to Review and Set Aside Order of the Federal Power Commission.

Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

JUDGMENT

This cause came to be heard on the petition of United Gas Pipe Line Company, for review of Order of the Federal Power Commission, issued on May 5, 1964, in Docket No. CI63-979, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Order of the Federal Power Commission in this cause be, and the same is hereby, enforced.

September 8, 1965

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*Of the District of Oregon, sitting by designation.

Issued as Mandate: Oct. 18 1965.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,693

UNITED GAS PIPE LINE COMPANY,
Petitioner,

VS.

FEDERAL POWER COMMISSION,
Respondent.

On Petition to Review and Set Aside Order of the Federal Power Commission

(OCTOBER 8, 1965)

On Petition for Rehearing

Before BROWN and GEWIN, Circuit Judges, and KILKINNY*, District Judge

PER CURIAM:

It is ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

*Of the District of Oregon, sitting by designation.

APPENDIX D

Natural Gas Act

Section 1. (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or pre-

decessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of any application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service

proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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No. [redacted]49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT CONTINENTAL OIL COMPANY IN OPPOSITION

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PRINTED IN U.S.A. — BY DELARUE/TEXAS

No. 870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

CONTINENTAL OIL COMPANY,

Respondents.

BRIEF OF RESPONDENT CONTINENTAL OIL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below and Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 350 F. 2d 689 and is also reprinted as Appendix A to the petition of United Gas Pipe Line Company (United). The jurisdiction of this Court is stated in United's Petition For A Writ Of *Certiorari.*

Counterstatement of Question Presented

This case presents essentially the following question, which we submit the Commission and the court below have correctly answered in the negative:

> Can United lawfully cease purchasing and taking natural gas which Continental is required to continue to sell under the Natural Gas Act, and thus abandon

the facilities by which it takes such gas or the service rendered by means thereof without first securing, after hearing, the Commission's permission and approval for such abandonment?

Statute Involved

The pertinent provisions of the Natural Gas Act are set out in Appendix D of United's Petition For A Writ Of *Certiorari*.

Counterstatement of the Case

The facts of this case are largely undisputed. However, some counterstatement is appropriate. In January 1953 Respondent Continental Oil Company (Continental) and United contracted for the sale and purchase of gas produced by Continental from the Johnson Bayou Field, Louisiana. This contract provided a primary term of ten years, with provision for termination thereafter upon notice of either party. Continental obtained a certificate of public convenience and necessity from Respondent Federal Power Commission (Commission) authorizing the sale of gas to United in accordance with its filed rate schedule, the substance of which was contained in the contract. United also obtained a certificate from the Commission authorizing construction of facilities necessary to take the gas from Continental, and deliveries consequently commenced on January 31, 1955.

Upon expiration of the primary term of the contract, Continental and United were unable to agree upon a new contract. Continental thereupon elected to terminate the contract in accordance with its provisions. However, neither Continental nor United sought abandonment or termination of their respective certificates granted by the Commission, and Continental did not seek to withdraw its rate schedule

which had been accepted by the Commission. Instead, Continental filed a unilateral rate increase to the area guideline level announced by the Commission in its Statement of General Policy No. 61-1. The Commission accepted this unilateral rate increase as Continental's lawful and effective rate under its rate schedule. United sought rehearing of the Commission's order accepting Continental's unilateral rate increase, but did not seek judicial review of the Commission's order denying United's application for rehearing. Thus, the unilateral rate increase became final and constitutes Continental's lawful rate for the sale of gas to United from the Johnson Bayou Field. Therefore, neither the rate nor Continental's right to unilaterally file the rate are at issue.

Disregarding Continental's demand to continue to take gas from the Johnson Bayou Field in accordance with Continental's effective rate schedule, United, acting on its own and without permission of the Commission, ceased taking Continental's gas on January 31, 1963, and did not resume taking such gas until subsequently compelled to do so by order of the Commission in Opinion No. 426 issued May 5, 1964. The court below, upon review of Opinion 426 and Opinion 426-A, which denied United's application for rehearing of Opinion 426, affirmed the Commission's action in requiring United to resume taking gas from Continental at the Johnson Bayou Field. The Commission and the court below stated that United's relief must be by application to abandon, and Commission permission to so abandon pursuant to Section 7(b) of the Natural Gas Act, 15 USC Sec. 717f(b).

Reasons for Denying the Petition for Writ of Certiorari

Continental respectfully submits that the decision of the court below affirming the opinion of the Commission is correct, and that United submits no grounds for this Court to entertain review of that court's decision. While this is a case of first impression, the principles involved in this case are not novel. This case presents simply the corollary, applied to a pipeline purchaser, of the principles previously decided by this Court in application to a producer seller in *Sunray Mid-Continent Oil Company* v. *Federal Power Commission,* 364 U.S. 137 (1960). In the *Sunray* case this Court established the principle that a producer selling gas under a certificate of public convenience and necessity cannot cease such sale and delivery of gas upon termination of the contract between producer and pipeline without first obtaining permission of the Commission pursuant to Section 7(b) of the Natural Gas Act to abandon such sale and delivery. The Court there recognized that the public interest required continuation of the service initiated by the certificated sale.

This public interest in continuation of a sale and service overrides the private interest of either producer or pipeline as reflected by their private contractual arrangements. In the case below, the Court of Appeals for the Fifth Circuit has properly recognized that this principle is not a one-way street to benefit pipelines and penalize producers, but a broad avenue of regulation establishing the Commission's jurisdiction over producers and pipelines alike to compel continuation of sales and services once commenced unless and until the Commission properly determines that the public interest permits abandonment.

Contrary to United's assertion, the Natural Gas Act necessarily regulates purchases of natural gas by pipelines, since such purchasing is inseparable from the sale of natural gas by producers. The Commission's jurisdiction to regulate the sale of natural gas must encompass the entire relationship of sale and purchase between producer and pipeline. Any other result would leave a regulatory gap by which pipelines rather than the Commission would dictate when the public will receive gas and when the public will not receive gas. The Natural Gas Act cannot be construed to permit a buyer to reject without Commission approval a sale of gas once initiated with Commission approval any more than it could be construed to permit a seller to cease selling without Commission approval. This must be true both during and after the term of the gas sales contract. United accepted the Commission's continuing jurisdiction over the sale and delivery, purchase and taking of gas when United installed certificated purchase facilities and commenced taking such gas through such facilities.

The decision of the court below is not contrary to the principles set out in the *Sunray* case. Rather, this decision is complementary to the *Sunray* decision in recognizing the applicability of the regulatory principles first stated in *Sunray* to both pipeline and producer. This case simply achieves equality for producers and pipelines under the regulatory scheme accepted by this Court in *Sunray*. United merely points to certain dicta in the *Sunray* case, taken out of context, to support its contention that there is a conflict between this case and *Sunray*. However, the dicta in *Sunray* must be read in the context of the facts of *Sunray*. In that case the Court was concerned with a producer who claimed the right to terminate a sale upon expiration of the contract period. There was no issue there of the buyer's contending that the Commission's jurisdiction did not attach to con-

tinued purchase and taking of gas. The rationale of this Court in the *Sunray* case applies as much to the pipeline as to the producer, since the concept of "service" there dealt with by the Court was one of service to the consuming public.

Finally, United's argument that the Natural Gas Act is unconstitutional to the extent it would permit the Commission to compel a pipeline to take gas in conjunction with a regulated sale must fall for lack of merit. The constitutional implications of this question were evident in the *Sunray* case. There is nothing novel in United's basic contentions which would now permit a meritorious argument of unconstitutionality.

Conclusion

For the foregoing reasons, this Court should not grant the petition for writ of *certiorari*.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 870

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND
CONTINENTAL OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–22a) is reported at 350 F. 2d 689. The opinions and orders of the Federal Power Commission are reported at 31 FPC 1079 and 32 FPC 8.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1965. A petition for rehearing was denied on October 8, 1965. The petition for a writ of certiorari was filed on January 3, 1966. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and

Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether Section 7(b) of the Natural Gas Act required petitioner, a purchaser and transporter of natural gas sold in interstate commerce for resale, to obtain Federal Power Commission approval of its plan to discontinue purchases at the conclusion of a ten-year sales agreement.

2. Whether the Commission could require petitioner to continue purchasing gas at the filed rate pending the filing of an abandonment application under Section 7(b) and decision thereon.

STATUTES INVOLVED

The relevant portions of Sections 1, 4, 5, 7, 16 and 19 of the Natural Gas Act (15 U.S.C. 717a *et seq.*) are set forth in the Appendix hereto, pp. 13–19, *infra*.

STATEMENT

On January 22, 1953, Continental Oil Company ("Continental") and United Gas Pipe Line Company ("United") executed a contract for the sale and purchase of gas from the Johnson Bayou Field in Cameron Parish, Louisiana (R. 181). The contract provided for a primary term of ten years, to continue in effect thereafter on an annual basis, unless either party chose to terminate upon 90 days' notice (R. 196). From and after January 31, 1958, the contract

called for a price of 8.9970 cents per Mcf plus tax reimbursement (R. 195).[1]

The Johnson Bayou Field is adjacent to United's 16-inch Mud Lake transmission line, which extends westward from Southwest Louisiana into the Beaumont, Texas, area. Continental agreed to deliver the gas here involved to a central point near this previously constructed line. To permit delivery, Continental constructed 4,400 feet of 2½-inch line, two separators and several storage tanks, while United constructed a separator, a meter station, about 55 feet of 4-inch line and valves.[2]

On October 23, 1962, pursuant to the contract, Continental advised United that it chose to terminate the contract at the end of the primary term, i.e., on January 31, 1963 (R. 397). After attempts to negotiate a new contract had failed, Continental filed with the Commission a supplement to its existing rate schedule providing for a unilateral increase in price to 14 cents per Mcf plus 1.75 cents for tax reimbursement, which it proposed to make effective on January 31, 1963 (R. 397–398).

United objected to the filing on the ground that Continental had no authority to make such a uni-

---

[1] On January 4, 1956, the Commission issued Continental a certificate of public convenience and necessity authorizing the sale and the continued operation of any jurisdictional facilities used to make the sale. *Continental Oil Company*, Docket Nos. G–6946 and 6949, *et al.*, order issued January 4, 1956. See 15 FPC 1650.

[2] On February 25, 1955, the Commission issued a certificate for United's continued transportation of gas from the Johnson Bayou Field and the operation of the facilities used for such transportation. *United Gas Pipe Line Co.*, 14 FPC 582.

lateral change. The Commission, however, accepted the increased rate filing since it was not above the area guideline price for increased rates, which was then, as now, 14¢ plus tax reimbursement.[3] The increased rate was not suspended, and United's application for rehearing was denied. *Continental Oil Co.*, 29 FPC 525. United did not seek judicial review of that order.

United thereafter notified Continental that purchases from the Johnson Bayou Field would cease as of 7:00 a.m., January 31, 1963 (R. 251, 398). On February 1, Continental petitioned the Commission to direct United "* * * to show cause why it should not be required to continue to take deliveries of gas produced by Continental in the Johnson Bayou Field * * * at the currently filed and effective rate" and to order United to take such gas during the pendency of such action (R. 242, 398). The Commission directed United to show cause "why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental * * *" (R. 267–271, 398–399).

[3] The Southern Louisiana guideline price announced on October 25, 1960, for initial (new) service was 21.5¢ exclusive of tax reimbursement. This was changed on October 31, 1961, to 21.25¢ inclusive of State taxes. Fourth Amendment to Statement of General Policy No. 61–1, 26 FPC 661. The guideline price for rate changes has, since September 28, 1960, remain fixed at 14¢ exclusive of tax reimbursement of 1.75¢. Statement of General Policy No. 61–1, 24 FPC 818.

After a full hearing, intermediate decision and argument, the Commission held that United's intention not to use, for an indeterminate time, the facilities for the purchase of gas from Continental constituted an abandonment within the meaning of Section 7(b) of the Natural Gas Act. Accordingly, it required United to resume purchasing gas consistently with Continental's filed rate schedule (R. 407, 408). The court of appeals sustained the Commission's order.

ARGUMENT

1. The court of appeals correctly sustained the Commission's conclusion that United was required by Section 7(b) of the Natural Gas Act to obtain Commission approval before it could discontinue its purchases from Continental. The Commission found that in terminating its purchases, United had abandoned "jurisdictional gas purchasing facilities" (R. 396, 407–408) that had been "constructed and operated by United for the sole purpose of receiving Continental's Johnson Bayou Field gas" and were "concededly facilities used for the 'transportation of natural gas in interstate commerce' within Section 1(b)" (R. 396, n. 1). Although Section 1(b) does not explicitly bring within the Commission's regulatory power the purchase of natural gas, it does give the Commission authority over "transportation of natural gas in interstate commerce." United was engaged in such transportation, and to the extent that it wished to terminate this phase of its operations it was required to obtain Commission approval.

The Commission's construction of Section 7(b) does

not conflict with *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137. Indeed, the reasons of policy stated by this Court in support of its decision in *Sunray* and in *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170, affirmatively support the result reached here. For to allow United to abandon its purchase and transportation of natural gas without Commission authorization would effectively prevent Continental's continued sale of its gas to the public, with the same "damaging effect * * * upon the policies of the Act" that the Court noted in reaching its decision in *Sunray*. See 364 U.S. at 141–142. The interstate market would be deprived of this supply of gas from Continental's reserves without the prescribed Commission finding "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." Section 7(b), pp. 16–17, *infra*. As in *Sunray*, the consequence would be that "the consumer ultimately would pay the bill for the rearrangement" of services as between the gas producer and another pipeline. 364 U.S. at 143.

In addition, unregulated termination by United of its arrangement with Continental would have other serious "practical consequences" on consumers—quite like the producer's termination in *Sunray*. See 364 U.S. at 147. If United were freely permitted to terminate its purchases, new purchases that might be re-

quired to make up for those abandoned would be made at new-gas prices, which are normally higher.[4]

The fact that United was not required to obtain a certificate of public convenience and necessity to purchase gas does not, as petitioner contends (Pet. 9), entitle it to discontinue the purchase and transportation as soon as its contractual obligation terminates. Relying on *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F. 2d 550 (C.A. 3), certiorari denied, 352 U.S. 971, the Commission held that even without such a certificate, United's facilities are "'dedicated to the public use and cannot be abandoned absent a showing under Section 7(b)'" (R. 399, n. 5). The abandonment provision is not, by its terms, limited to those holding certificates, and the policy of the Act extends to pipelines like United whether or not they possess certificates. This position is not inconsistent with this Court's assumption in *Sunray* that a limited-time certificate would permit a producer to discontinue its operations at the certificate's expiration. In that case, the Court assumed only that approval of such a limitation amounted to an authorization under Section 7(b)

[4] Thus, while United was declining to take gas from Continental at the 15.75¢ guideline price (14.0¢ plus 1.75¢ tax reimbursement) for changed rates in the Southern Louisiana area involved (see Federal Power Commission Rules of Practice and Procedure, § 2.56, 18 C.F.R. (1961 revision, 1965 Supp.) § 2.56; 24 FPC 818 and 26 FPC 661), the record shows it entered into some new purchases of gas at prices ranging between 18¢ and 19.75¢ (R. 23–27, 330). There are indications that these purchases were not made to compensate for the termination of the supply from Continental (*ibid.*), but this, of course, would be something that could be more fully developed in an abandonment proceeding initiated by United.

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to abandon the certificated service at the conclusion of the certificated period.[5]

In any event, although the Commission did not rely on the terms of any certificate, United had, in fact, obtained a certificate on February 25, 1955, for the "continued transportation of natural gas" over the facilities involved here. FPC Docket No. G–2818, 14 FPC 582.

In terms of the comprehensive purposes of the Natural Gas Act, the Commission's ruling obviously effectuates a desirable symmetry between the obligations of sellers and purchasers subject to the Commission's jurisdiction. United's obligation not to terminate its purchase arrangements without Commission approval is the correlative of Continental's obligation not to cut off the source of supply. In analogous circumstances, this Court construed the abandonment provisions of the Interstate Commerce Act to apply not merely to a carrier conducting the operations which were to be terminated but also to the property owner over whose facilities the carrier was conducting such operations. *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 144–145.

2. Since United was required to obtain Commission approval before abandoning its purchase ar-

[5] Nor does this Court's reference in *Sunray* to the seller's continuing obligation in that case to deliver gas to the purchaser "on the latter's request" (364 U.S. at 155) support petitioner's argument that a purchaser is free to abandon his purchases at any time (Pet. 9). We believe that that statement, in context, referred to the purchaser's right, under the particular contract involved in *Sunray*, to call for an additional supply of gas up to 150 percent of the specified annual amount. 364 U.S. at 139.

rangement with Continental, the Commission was entirely justified in requiring United to continue its purchases at the outstanding lawful rate while an application for abandonment, if any were filed, was being considered and determined. United objected to the rate filed by Continental only on the ground that it was unauthorized and not because it was unjust, unreasonable or discriminatory. It did not ask that the rate be suspended or that it be collected subject to refund. Having been filed and not having been suspended by the Commission, Continental's rate became the lawful rate, and United was required to abide by it until it received abandonment authorization under Section 7(b).

Nothing said by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, is to the contrary. Before any agreement is entered into, sellers and buyers may, of course, negotiate as to price, and the seller has no power beyond that of an offeror; he may set his price and then seek out "prospective customers." 350 U.S. at 343. But this Court noted in both *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, and in *Sunray, supra,* that if a contract authorizes the filing of a new rate *ex parte* or if the contract term expires, the seller may make rate changes without the purchaser's consent. See 358 U.S. at 112–113; 364 U.S. at 155. The purchaser, of course, is not left without rate protection. If the seller attempts to raise his rate, the purchaser may attack it as unjust, unreasonable, discriminatory or preferential, and may seek to have it suspended or collected subject to

refund. Alternatively, a purchaser may request permission under Section 7(b) to discontinue the seller's gas. United invoked none of these remedies, but chose instead to attack the rate filing as impermissible under the Act. The Commission properly rejected that course.

Finally, we do not believe that the present decision will have a significant impact upon the price of gas to the pipelines or ultimate consumers. Many purchase contracts have already expired, but the present case appears to be the first in which the parties have failed to reach a further agreement upon the expiration of the initial contract term. If producers do file higher rates at the expiration of contract periods, pipelines and their customers may be protected from undue increases by the Commission's power (1) to suspend the rates, and, after the expiration of the statutory suspension period, to order refunds with interest on any excessive amounts collected, and (2) to authorize the pipeline to abandon its facilities if it can demonstrate that its gas needs can be met from cheaper sources.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 1966.

APPENDIX

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w provides in pertinent parts:

SEC. 1. * * *

* * * * *

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or

(2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint,

at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission

shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SEC. 7. * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted,

or that the present or future public convenience or necessity permit such abandonment.

* * * * * *

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

* * * * * *

SEC. 19. * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Ap-

peals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judg-

ment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28 [sec. 1254]).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED GAS PIPE LINE COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

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Number 49

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 485-501) is reported at 350 F. 2d 689. The opinion and order of the Federal Power Commission (R. 395-416) is reported at 31 FPC 1079, and the opinion of the Federal Power Commission denying rehearing (R. 459-465) is reported at 32 FPC 8.

JURISDICTION

The judgment of the Court of Appeals was entered September 8, 1965 (R. 502). Petition for rehearing was denied by order issued October 8, 1965 (R. 505). Petition

for writ of certiorari was filed on January 3, 1966, and was granted February 28, 1966 (R. 506).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. 717r(b).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act [Sections 1(b), 7(b), 7(c) and 7(e), 52 Stat. 821, as amended, 15 U. S. C. 717-717w] are set out in Appendix A, infra, pages 1a-3a.

QUESTIONS PRESENTED

1. Does the Natural Gas Act authorize the Commission to require a pipe line company, without its consent, to continue to purchase gas after the Seller has cancelled the contract under which purchases had been made, and pay therefor a price, established ex parte by the Seller which is higher than the price contained in the cancelled contract?

2. If so, is the Act to that extent unconstitutional as violative of the due process requirements of the Fifth Amendment to the Constitution of the United States?

STATEMENT

United Gas Pipe Line Company (United) is a natural gas transmission company and Continental Oil Company (Continental) is a producer of natural gas.

On January 22, 1953, Continental and United entered into a contract covering the sale and purchase of gas produced by Continental in the Johnson Bayou Field in Cameron Parish, Louisiana. The contract was for a primary term of 10 years from January 31, 1953 (R. 196); provided, that the contract would automatically continue in effect after expiration of the primary term for successive periods of one year each, unless either party terminated the contract at the end of the primary term, or any succeeding annual period, by giving the other party 90 days prior written notice (R. 196). The contract contained fixed rates, plus provision for tax reimbursement by the buyer, and the rate actually being paid at the end of the second 5 year period of the contract was 10.79¢ per Mcf, which included 1.8¢ per Mcf tax reimbursement (R. 55, 224).

Continental filed the contract with the Commission and sought a certificate of public convenience and necessity authorizing this sale to United. The certificate was issued January 4, 1956 (15 FPC 1650).

The Johnson Bayou Field was located immediately adjacent to United's existing 16-inch transmission line extending from Southwest Louisiana to Beaumont, Texas, and in order to receive this gas into its existing transmission line, United constructed and placed in operation a separator, a meter station and 55 feet of 4-inch line (R. 20). United later sought and was issued on February 25, 1955, a certificate of public convenience and necessity approving the construction and continued operation of these facilities (14 FPC 582).

Exercising its option under the contract, on October 23, 1962, Continental wrote United advising (R. 13):

> "Continental Oil Company hereby gives notice to United that it elects to terminate said contract as of the thirty-first day of January, 1963."

Thereafter, representatives of Continental contacted United seeking execution of a new contract covering future sales of Johnson Bayou Field gas and specifying that it include, among other things, a new series of prices reaching 18.75¢ per Mcf, plus the right to charge the South Louisiana area rate if it proved to be higher (R. 14).

United was not agreeable to these terms and offered to continue purchasing on the basis of the existing contract, but the parties could not reach agreement. United then advised Continental that it would support an application by Continental to the Commission for abandonment of Continental's certificate to make this sale to United, and that United would contractually agree to continue buying Johnson Bayou Field gas on a day to day basis at the existing contract rate, pending the Commission's action on the abandonment application (R. 15). Continental declined to apply for an abandonment of its certificate, and it rejected United's offer to buy (R. 16).

Acting unilaterally, Continental then filed with the Commission on December 28, 1962, an increased rate of 15.75¢ per Mcf, including tax reimbursement, and gave notice that it would become effective January 31, 1963, the effective date of the contract cancellation (R. 17).

United filed a complaint with the Commission protesting Continental's unilateral rate filing and asking that it be rejected. Without having acted upon United's protest, (it was substantially rejected), the Commission on January 25, 1963, accepted the unilaterally filed rate increase and permitted it to become effective on January 31, 1963. When advised thereof, United told Continental it would discontinue receipts of Johnson Bayou Field gas on January 31, 1963 (R. 19).

Continental thereupon filed a petition with the Commission asking that United be required to show cause why it should not be required to purchase Johnson Bayou Field gas (R. 242-250). United filed an answer to the petition and on May 1, 1963, the Commission directed a show cause order to United. United was not directed to show cause why it should not be required to purchase Johnson Bayou Field gas, rather United was directed to show cause "* * * why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental Oil Company from Johnson Bayou Field, Cameron Parish, Louisiana." (R. 267-271) Upon hearing, United made proof of the above facts and showed the following additional facts.

United was, at the time of the hearing, over bought on gas in South Louisiana. At that time United had, in compliance with contractual minimum purchase obligations, paid producers in South Louisiana over the preced-

ing 2-½ years approximately 15 million dollars for gas it could not take into its system because it had no market for the gas (R. 19). It had since January 31, 1963, supplied its customers' requirements without any Johnson Bayou Field gas, and its facilities in that field remained in place and could be used at any time to receive gas from the field if needed (R. 20-21).

United's markets for gas from the Johnson Bayou Field were in the Southeast Texas area where it sold much of its gas to industrial customers at contractually fixed prices, and where it was experiencing severe competition from unregulated intrastate producers who were taking customers from United by offering them gas cheaper than United could sell it (R. 21). United's proof was that it needed to cut its costs to meet this competition, and not increase them as paying Continental's unilaterally increased rate would force it to do.

The Commission's presiding examiner found that United had abandoned none of its facilities or any "service" rendered its customers, and he dismissed the show cause order (R. 324-334).

The Commission, one commissioner dissenting, reversed its examiner, holding that the cessation of flow of gas through United's Johnson Bayou Field facilities was an abandonment of those facilities accomplished without the Commission's prior approval under Section 7(b) of the Act. Having adjudicated the issue posed by its show cause order, the Commission ordered United to purchase Continental's gas, directed that it pay therefor

Continental's unilaterally filed rate, and that the purchases be made in volumes consistent with the cancelled contract (R. 395-416).

Upon motion by United, the Commission granted a stay of its order (R. 418-419), but in denying United's petition for rehearing, it refused to continue the stay pending court review (R. 459-465).

United appealed the Commission's order to the United States Court of Appeals for the Fifth Circuit and asked a stay of the Commission's order pending judicial review, but the stay was declined. In its opinion on the merits, the court agreed with the Commission that the cessation of flow of gas through United's Johnson Bayou facilities constituted an abandonment of those facilities, but the court was "Not so sure just what the effect might be" of this conclusion with respect to the Commission's asserted power to require United to pay Continental's unilaterally established rate. The court affirmed the Commission's order on the basis of its view that Section 7(b) applied to the buyer as well as the seller in a "jurisdictional sale" and that both the buyer and the seller must each obtain Commission approval before terminating the transaction. The court then held United had no choice but to pay Continental's unilaterally established rate, until granted abandonment authorization pursuant to Section 7(b), and that the constitutional issues raised by United were matters for consideration if an abandonment were subsequently denied (R. 485-501).

SUMMARY OF ARGUMENT

In *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392, this Court noted that a certificate unlimited as to term imposed an obligation on a producer, as had long been the case with pipelines, to continue selling upon the buyer's "request" after expiration of the underlying gas sales contract, unless it could justify an abandonment before the Commission. *Sunray* pointed out that this obligation carried with it the right in the producer to change its rates without the buyer's consent, for service rendered at the buyer's "request" after expiration of the contract.

Insisting that its obligation to serve imposed on the buyer the obligation to buy after the contract term, and to do so at increased rates unilaterally determined and filed by the seller, Continental cancelled an existing contract with United, rejected United's offer to contract, unilaterally filed a higher rate for its gas than United was willing to pay, and secured a Commission order forcing United not only to purchase but to pay Continental's rate.

Never before in the history of the Act has the Commission assumed it had power to order purchasing or the payment of an increased price fixed unilaterally by the seller.

This mandatory order, directed to the purchaser, requires purchasing. It is an unlawful extension of Commission jurisdiction into an area not covered by the Act. Legislative history shows Congress declined to adopt a

bill which included jurisdiction over purchasing; Section 1(b) of the Natural Gas Act, which defines its coverage, does not include purchasing; and the government concedes in this Court that the Act's coverage does not include purchasing.

The Commission's justification for its order is that, unless it has power to require purchasing, gas will cease flowing through some of United's facilities and this will constitute an unauthorized abandonment of facilities and reserves. The Commission's justification is obviously fallacious for it assumes the existence of power not granted by the Act.

Under the Act rates are made by contract. In *United Gas Pipe Line Co. v. Mobile Gas Corporation*, 350 U.S. 332, 100 L. ed. 373, this Court held that the rate-making powers of natural gas companies are "unaffected" by the Act, and that a seller determining its rates ex parte (as Continental did here) can do no more than offer its service and rate to the buyer as a "prospective" customer. The Commission's order unlawfully forces a buyer to buy and to pay the seller's ex parte rate.

The Commission's order forces United to incur costs it cannot recover. Under the Act all gas is sold by contract, and United sells 43 per cent of the total volume it handles directly to industrial customers for their own use. The Commission has no power to raise any rate, and it has absolutely no jurisdiction over rates for direct industrial sales. Because the Commission has no authority to increase existing contract rates in order to recover in-

creased costs, the consequence of the Commission's order will be to render sales of gas by pipelines at contractually fixed prices economically ruinous.

If the Act contains provisions, which United denies, that force United to buy Continental's gas and to pay Continental's unilaterally increased price, it results in the taking of United's property without any provision for adequate compensation and is, to that extent, violative of the Fifth Amendment to the Constitution.

ARGUMENT

1. Basic Errors In The Decision Below.

In *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392, this Court held that the Commission had power to tender to a producer a certificate which was not limited to the term of underlying sales contract, notwithstanding the fact that the producer had requested such a limited certificate. Having so ruled, the Court commented on the rights and obligations that would come into existence after expiration of the contract. In substance the Court said the Act imposed an obligation on the seller to continue selling gas on the buyer's "request", unless the seller could justify an abandonment before the Commission. (The Commission had previously recognized and enforced this obligation as to both pipelines and producers.) The Court went ahead to say that the obligation carried with it the right in the seller unilaterally to file needed rate increases applicable to this continued service. The Court's statement

was fully consistent with, and implemented, two complimentary aspects of the Natural Gas Act, i.e., the Act does not regulate "purchasing", and rates under the Act are fixed by contract.

Insisting it read into the Court's language an obligation on the buyer to continue buying after expiration of the contract, and to do so on the seller's terms, Continental set in motion a series of events intended to force United not only to buy Continental's gas but to pay a higher rate than United was willing to pay. When United refused, Continental complained to the Commission and the Commission issued the order giving rise to this proceeding.

The Commission's order, for the first time in the history of the Act, requires a buyer: (1) to purchase gas; (2) to pay a price fixed unilaterally by the seller without contractual assent by the buyer; and (3) to purchase volumes consistent with a cancelled contract. This mandatory order, directed to the purchaser, is explicit regulation of "purchasing" and denies the buyer its right to contract. It is violative of clearly expressed Congressional intent and the specific wording of the Act.

In issuing its order the Commission did not rely on any claimed grant of power to regulate "purchasing", or to force the buyer to accept the seller's rate, rather it relied on its own argumentative conclusion that the power granted it to authorize abandonments of physical facilities necessarily gave it power to require purchasing in order to prevent the abandonment of facilities. The

Court of Appeals affirmed the order on the basis of its view that Section 7(b) applied to the buyer as well as the seller in a "jurisdictional sale".

The decision below rejects this Court's pronouncement in *Sunray*, that continued service is required on the buyer's "request", and holds that the Commission can force the buyer to both accept continued service and pay the seller's unilaterally increased rate. In doing so, the decision not only denies the buyer the right to contract as to rates, it forces increased costs on the buyer which cannot be recovered and renders the buyer's resale of gas at contractually fixed prices economically ruinous.

2. The Government Here Concedes That Section 1(b) Does Not Bring Purchasing Of Gas Within The Commission's Regulatory Power.

Significantly, in its Brief in Opposition to the petition for writ of certiorari the government concedes that Section 1(b) does not bring purchasing of gas within the coverage of the Act. The following appears on page 5 of the brief:

> "Although *Section 1(b) does not explicitly bring within the Commission's regulatory power the purchase of natural gas*, it does give the Commission authority over 'transportation of natural gas in interstate commerce' * * *". (Emphasis added)

In *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516, 68 S. Ct. 190, 92 L. ed. 128 (1947), this Court emphasized that Section 1(b) "* * * determined the Act's coverage * * *." Thus

the government's concession on purchasing necessarily extends to the entirety of the Act, including those subordinate sections which empower the Commission to issue certificates of public convenience and necessity and to authorize abandonments. The concession, in its full implication, is an obviously correct statement of the law. The terms purchase and purchasing do not appear in the Act, and the Court of Appeals held: "There is in the Act no provision that a purchaser must, or even may, obtain a certificate to purchase gas."

3. Legislative History Shows Congress Declined To Bring Purchasing Under Commission Control, And The Commission Has Heretofore Not Regulated Purchasing.

Legislative history shows that at the time Congress was considering passage of the Natural Gas Act, it declined to adopt a then pending bill which would have brought within the Commission's regulatory control the "procurement" of natural gas by pipelines, as well as the "sale, exchange, transmission, or distribution" of gas in interstate commerce. The bill Congress did adopt contained the more limited coverage spelled out in Section 1(b).(1) This Court has had occasion to refer to

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(1) In *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 515, 516, this Court said:

"Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale."

this legislative history, as reflected in the following quotation from *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 513, N. 16, 93 L. ed. 1499:

> "While Congress was considering the passage of the Natural Gas Act, a bill (HR 5711 and S 1919, 75th Cong 1st Sess) was introduced in both houses of Congress on March 17, 1937, which provided that 'this Act shall apply to the procurement of natural gas for the purpose of its transmission through pipe lines and its sale, exchange, transmission, or distribution in interstate commerce * * *' * * *.
>
> "The provisions of this bill, however, failed of adoption; instead Congress enacted § 1(b) with its specific exemptions from the coverage of the Act."

The Congressional intent reflected in both this legislative history and the clear wording of Section 1(b) was, until this decision, followed throughout the twenty-seven year history of regulation under the Act. Never once during this period did the Commission assume it had power to require a pipeline either to purchase gas or to ask its permission to stop purchasing. Quite the contrary, for in 1960 the Commission authorized a producer to abandon its certificate to sell in a decision which reflected the view that a pipeline purchaser was free to discontinue purchasing from the producer upon expiration of its ten year contract with the producer.

In *P. R. Rutherford, et al,* Docket No. G-10,922, 23 FPC 357, the Commission authorized the producer to abandon its certificate to sell upon a showing that the

pipeline had ceased purchasing after expiration of its contract with the producer. In his concurring opinion Commissioner Connole pointed out (23 FPC 357, 360):

> "* * * Moreover, *no use whatsoever has been made of the service authorized under the certificate in the last two years despite a willingness and ability of the certificate holder to render the service.* Dormancy is to be avoided as a matter of public policy in certificates of public convenience and necessity. To continue the certificate here would create a dormant certificate. Plainly it would be a vain act for *we cannot compel the pipeline to purchase the gas and the certificate holder cannot be required to sell its gas if the buyer is unwilling to buy.*" (Emphasis added)

The significance of this decision is brought into sharp focus when it is recognized that at the time it was issued the Commission had long recognized and applied the rule that the seller's certificate imposed the obligation on the seller to continue selling, upon the buyer's demand, after expiration of the underlying sales contract.(2)

4. The Act Permits The Buyer To Reject A Seller's Ex Parte Established Price.

Under the Act rates are fixed by contract. When Continental cancelled its gas sales contract with United and availed itself of the right to fix its rate unilaterally,

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(2) A pipeline in *United Gas Pipe Line Co.* 3 FPC 3 (1942), and a producer in *Harper Oil Company,* 22 FPC 756 (1959), were denied permission to abandon their unlimited certificates to sell when the buyers demanded continued service after expiration of sales contracts.

it then "offered" its service on the basis of its ex parte rate and United, under these circumstances, had the right of a "prospective" customer to accept or reject service at the offered rate. The Commission had no authority over this rate other than to review it and reduce it, if it were higher than "just and reasonable" when measured by Continental's needs; and nothing in the Act operates to force United to accept either the rate or the service, or authorizes the Commission to force United to do so.

There have been three decisions by this Court, all involving United, which are in point here. In *United Gas Pipe Line Company v. Mobile Gas Corp.*, 350 U.S. 332, 100 L. ed. 373, United sought, during the term of its contract, to increase a rate it had contractually agreed to with Mobile, a purchaser. It filed a new rate with the Commission and asked that it make the higher rate effective. Mobile opposed and United argued that the Act permitted it to initiate such a proposed change and authorized the Commission to make it effective. Upon review this Court said 'no', and in doing so reviewed at length both the rate-making powers of natural gas companies and the Commission's powers with respect to rates. The pertinent language from *Mobile* is as follows:

> "* * * *In short, the Act provides no 'procedure' either for making or changing rates; it provides only for notice to the Commission of the rates established by natural gas companies and for review by the Commission of those rates.* The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.

> "All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more. Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, *the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish ex parte, and change at will, the rates offered to prospective customers;* or to fix by contract, and change only by mutual agreement the rate agreed upon with a particular customer."(3) (Emphasis added)

When applied here, this language leaves no room for conjecture. First, it says the Act presumes a capacity in the parties to contract as to rates. Secondly, it says that rate-making powers of the parties are unaffected by the Act, that they have the rate-making powers they would possess absent the Act. Thirdly, it says these powers are to fix by contract, and change only by agreement, rates agreed on with a particular customer; or to fix ex parte, and change at will, the rates OFFERED prospective customers. Lastly, it says the Act provides no procedure for making rates and that the Commission can only review rates.

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(3) 340 U.S. at page 343.

Thus this Court has said in the clearest possible terms that the rate-making powers of natural gas companies are "unaffected" by the Act, and that the Commission cannot make rates. (The Commission's power to "review" rates set by natural gas companies does not change this basic plan of the Act.) From this it necessarily follows that Continental's power to fix a rate for its Johnson Bayou Field gas, and United's power to accept or refuse that rate, were "unaffected" by the Act and remained the same as they would have been "in absence of the Act"; and nothing in the Natural Gas Act, be it Section 7(b) or otherwise, imposes any obligation on United to accept Continental's rate, absent United's assent thereto.

Clearly, rates under the Act (as would be the case in the absence of the Act) are made either by bilateral contracts in which rates are agreed on and changed only on mutual consent, or by unilateral contracts, in which the seller offers a rate and the buyer accepts or rejects the offered rate by buying or refusing to buy.(4) United respectfully points out that rates fixed by both types of

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(4) Restatement of The Law of Contracts, Volume 1, 312, page 10:

> "A unilateral contract is in a very real sense, as its name implies, a one-sided contract. There are two parties to the contract, it is true, and a manifestation of assent on the part of each is usually necessary to its formation; but one of the requisites for making the contract should not be confused with the contract itself. The contract is merely the promise, not the mutual manifestation of assent or the consideration paid for the promise. In a bilateral contract, on the other hand, as there are contractual promises on both sides, the contract is properly called bilateral."

contracts arrive at the same end — acceptance of the rate by both parties. The essential ingredient to any completed contract, be it bilateral or unilateral, is agreement; the difference between the two types being that agreement is reached before performance in the bilateral contract and reached by performance in the unilateral contract.

Having cancelled the contractually agreed on rate for Johnson Bayou Field gas, Continental's rate-making power remained that of either agreeing with United on a new rate or, in the language of *Mobile*, "to establish ex parte, and change at will, the rates offered to prospective customers". Having decided on the latter course of action, it "offered" its increased rate to United as a "prospective" customer.

This Court's holding in *Mobile* concerning the rate-making powers of natural gas companies was repeated literally(5) and emphasized in *United Gas Pipe Line Company v. Memphis Light, Gas & Water Division*, 358 U. S. 103, 3 L. ed. 2d 153, where it was held that a seller could file and collect a rate determined ex parte when that arrangement had been contractually agreed to by the parties.

The third decision in point here has been referred to above. It is *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392. As indicated above this case affirmed the Commission's power to grant a producer an unlimited certificate which extended beyond the term of the producer's contract to sell. Sunray argued that the Commission

(5) 358 U.S. at page 110.

lacked power to refuse it a certificate limited to the term of its sales contract, insisting that such refusal denied it the right to contract as to rates. In rejecting this argument this Court said that the unlimited certificate in no way denied Sunray its right to contract as to rates. The Court's language was as follows:

> "*It is apparent that the Commission's order in no way violates the integrity of petitioner's contract with United.* During its term, both parties are bound by it to the same extent as any members of this regulated industry. *When it expires, petitioner, to be sure, will be under an obligation to continue to deliver gas to United on the latter's request unless it can justify an abandonment before the Commission;* but we do not see how this in any way disturbs the integrity of the contract during its term. The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the Act. *It will be free then, as it was not free during the contract term under the contract here in question, to make rate changes under § 4 without United's consent.* It is said that petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it. But United, subject to the Act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under Mobile, it may be discovered that each side has its bargaining strength."(6) (Emphasis added)

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(6) 364 U.S. at page 155.

United has emphasized portions of the above quotation because the language makes clear that the existence of an unlimited certificate does not detract from either party's right to contract as to rates. During the term of their bilateral contract both parties remained bound by their agreement. Upon expiration of the bilateral contract, Sunray could file increased rates and United could accept or reject those rates by requesting or not requesting service. United's right to do this is recognized in that portion of the Court's language which said that Sunray's obligation was "* * * to continue to deliver gas to United *on the latter's request* * * *." The Court's use of the words "on the latter's request" was exact and meaningful because Sunray stressed the argument that the Commission's refusal to grant it a certificate limited to the term of the contract placed it in "* * * a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it."(7)

Sunray did not change the recognized plan of the Act with respect to service or rates, rather it reaffirmed it. And however vexing to the seller, the obligation to continue service on the buyer's request is not unfair to the seller. The seller is at liberty to file and collect an adequate rate for the service. If the service is not requested, the seller is entitled to an abandonment. There is nothing in these circumstances that can support a charge of unfairness to the seller. Unfairness lies in the opposite

(7) 364 U.S. at page 155.

direction — that of forcing the buyer to buy on the seller's unilaterally established terms.

If, after cancelling its contract, Continental was discontent with United's purchasing, then two courses of action were open to it. First, if Continental wanted stability in volumes purchased which a contract would have furnished under *Mobile*, it should have contracted for it. United offered such a contract and the offer remains open. This offer did not suit Continental anymore than Continental's offer suited United. But the fact that each party disliked the other's terms does not mean that Continental was right and United was wrong, and it did not give the Commission power to force United to accept Continental's terms.

The course alternatively available to Continental was to apply to the Commission for permission to abandon its certificate to sell this gas to United. United had told Continental in writing it would support the abandonment. The Commission certainly would have granted the certificate had it acted on the basis of law and its own precedent.

5. The Decisions Below Misinterpreted Sunray.

The decisions below misinterpreted *Sunray*. They view *Sunray's* holding, that producers with unlimited certificates are required to serve beyond the contract term, as in some way changing or going beyond the established law with respect to rates and with respect to buyer's right to "request" service after expiration of its contract with the seller. In their view *Sunray* changed the buyer's right

to "request" service into an obligation to accept service, and it changed the buyer's right to contract as to rates into an obligation to accept the seller's ex parte rates. As a matter of fact, this completely incorrect interpretation of that decision was the decisive consideration that shaped the decision of the Court of Appeals.

But *Sunray* did not change the law with respect to rates, or with respect to the buyer's right to request service after expiration of its contract with the seller. *Sunray* did not say that the seller's obligation with respect to continuing service imposed an obligation on the buyer to continue buying. More especially did *Sunray* not say that the seller's obligation to continue service imposed an obligation on the buyer both to buy and to do so on the seller's terms. *Sunray* said just the opposite. It said that the producer's obligation, was to continue service on the buyer's "request", thus accurately affirming the contingent nature of the obligation imposed by an Act which did not regulate purchasing and which maintained in the buyer the same right to contract for service and rates it would have possessed "in the absence of the Act".

6. The Commission's Error In Ruling United Had Violated Section 7(b) And In Using Section 7(b) To Force United To Buy Gas On Continental's Terms.

The Commission ruled it necessarily had jurisdiction to order purchasing at Continental's price because, it said, by refusing to purchase at Continental's price United had violated Section 7(b) of the Act. The claimed

violations are: violation of a "cease purchasing" test contained in Section 7(b) and abandonment of facilities and reserves without prior approval of the Commission.

The answer to these assertions is twofold. First, there is no "cease purchasing" test in Section 7(b); and, second, the conclusion that to cease purchasing on any terms is to abandon facilities and reserves begs the question. The question is does the Commission have jurisdiction to order a buyer to purchase gas at the seller's unilaterally fixed price? That question is not answered by pointing to facilities and reserves and saying they will be abandoned unless we have authority to force United to purchase gas at Continental's price.

The Commission's ruling on United's argument that "* * * we [the Commission] lack the power to compel pipelines to purchase gas after the expiration of gas sales contracts"(8) was as follows:

> "* * * Moreover, United ignores the thrust of Section 7(b). That section frames the relevant issue, not in terms of whether this Commission has the power to compel continued purchases, but whether the 'public convenience and necessity' dictates that pipelines *cease* purchasing." (Emphasis theirs)

But Section 7(b) imposes no test to be met before pipelines cease purchasing. The terms "purchasing" and "cease purchasing" do not so much as appear in the section. The section does not deal with purchasing and it frames no test with reference to purchasing. No purchaser of gas

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(8) Opinion 426, R. 404.

has ever obtained Commission approval to cease purchasing.

Moreover, United has no certificate to purchase Johnson Bayou Field gas and the Commission has no authority to issue such a certificate. United's position without a certificate can be no more exacting than Sunray's would have been had it received a certificate limited to twenty years. In the absence of a certificate, either because of its expiration or because its issuance is not authorized, the Commission cannot interpose Section 7(b) to prevent discontinuance of an act.

The question of whether the Commission has authority to order the purchasing of gas at a price fixed unilaterally by the seller is not answered by the Commission's insistence that, without such authority, facilities and reserves will be abandoned. Before discussing this further, United points out that in fact it has abandoned neither facilities nor reserves. When United ceased purchasing Johnson Bayou Field gas, all it did physically was close a series of valves. It removed none of its facilities and it altered none of them. And the Johnson Bayou Field reserves remain physically attached to United's system. If there were a drainage problem, and United does not believe there was, it resulted from Continental's insistence that it preferred drainage to selling its gas to United at 10.79¢ per Mcf, and from its refusal to apply for an abandonment in order to sell its gas to another purchaser.

In *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U. S. 498, 93 L. ed. 1499, this

Court ruled on exactly the same process of reasoning employed here by the Commission with reference to implied jurisdiction. There Panhandle, the owner of a pipeline system transporting natural gas in interstate commerce, transferred gas leases to a subsidiary and the subsidiary contracted to sell the gas to be produced from the leases to an intrastate purchaser. In *Panhandle*, as here, the Commission reasoned that gas reserves are an essential element of natural gas service (in *Panhandle* they were termed the "lifeblood" of service) and that such disposal of reserves, previously relied on in granting the pipeline certificates to construct facilities and sell gas, might render the pipeline unable to perform. This, the Commission said, would result in an abandonment of both service and facilities without the Commission's prior approval granted under Section 7(b), and therefore the Commission had jurisdiction to regulate the sale of leases. The Court rejected that argument and held that Section 7(b) could not be relied on to achieve jurisdiction not otherwise granted by the Act. The Court's language was as follows:

> "The Federal Power Commission leans heavily upon § 7(b) which provides that no natural-gas company may abandon any of its facilities subject to the jurisdiction of the Commission without the prior approval of the Commission. *The argument here is that since natural gas is the 'lifeblood' of a pipeline system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the con-*

sent of the Commission will result. The argument begs the question." (9)

Power does not exist in the Commission to force the purchasing of gas at a rate unilaterally fixed by the seller, and Section 7(b) cannot be relied on by the Commission as an excuse for doing so.

7. The Decision Below Forces United To Incur Costs It Cannot Recover And Renders Economically Ruinous The Pipelines' Sale Of Gas At Contractually Fixed Rates.

The Commission's order forces United to incur increased costs, yet *Mobile* held that neither the Commission nor United had power to raise United's contractually fixed, jurisdictional rates to recover increased costs. In *Mobile* United proved that its rate applicable to a sale for resale in interstate commerce was so low as not to afford United a reasonable return. Agreeing an increase was required if United was to recover its costs and earn a reasonable return, the Commission approved a rate increase and authorized United to collect it. The Commission was reversed on appeal, and this Court sustained the reversal saying:

"Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply

(9) 337 U.S. at pages 508-509.

> contracts are subject to unilateral change by the natural gas company whenever its interests so dictate."(10)

These comments are equally applicable here, and they forecast the havoc which will result if producers can impose on pipelines acceptance of unilateral rate increases.

Moreover, United's latest report (Form 2) to the Commission shows that for the year 1965 United sold 558,249,762 Mcf of gas directly to industrial customers for their own use. This 43 per cent of United's sales falls in a category over which the Commission has no rate jurisdiction whatever. Most of this gas (68 per cent) was sold at specific prices, contractually fixed. There is no way United can recover increased costs from these industrial customers.

The Commission's order strikes at the very heart of the pipeline's ability to sell gas at contractually fixed prices. If the pipeline cannot control the upward limit of the price it will pay for gas, it will be economically ruinous for the pipeline to sell gas at contractually fixed prices.

8. If The Natural Gas Act Forces Purchasing On Terms Unilaterally Imposed By The Seller, Without Consideration Of The Needs Of The Buyer, Then The Act Is To That Extent Unconstitutional.

If the Natural Gas Act does contain provisions, which United denies, that permit Continental unilaterally

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(10) 350 U.S. at page 344.

to fix the quantities of gas United must buy and the rate it must pay, all without consideration of the needs of United and without provision for United to recover the increaesd costs forced upon it, then the Act is to that extent unconstitutional.

If the Act contains such provisions, they serve both to take United's properties and to deny United its ability to maintain its markets and earn a reasonable return; and this by an Act which does not empower the Commission to make rate changes required to compensate for such taking of property, and which does not empower the Commission to protect the interstate sale of gas from discriminatory intrastate competition even from those producers who can unilaterally fix the price United must pay for gas.

Whatever the Commission's power to force Continental to sell its gas during the full term of its certificate, that power does not violate Continental's right to adequate compensation for the gas sold after the contract term. This is true because the Act, as interpreted by the Commission and the Court of Appeals, affords Continental, after expiration of the contract term, both a market for its gas and the right to fix the price at which its gas will be sold, subject only to review by the Commission and possible reduction of the rate if it is higher than that which is just and reasonable when measured by Continental's needs.

The Act extends no corresponding protection to the buyer of the gas.

In *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 184, 95 L. ed. 190, the Oklahoma common purchaser statute was held not to violate constitutional prohibitions where it provided "* * * that if no agreement can be reached [between seller and buyer] then the price and terms shall be such as may be fixed by the Corporation Commission after notice and hearing." In *Republic Natural Gas v. Oklahoma*, 334 U.S. 62, 69, 92 L. ed. 1212, Mr. Justice Rutledge, joined by Mr. Justice Black, Mr. Justice Murphy and Mr. Justice Burton, dissenting (the majority did not reach the merits) spelled out that required of the Oklahoma Commission in fixing the price for such forced purchasing:

> "This assumes that if the parties should be unable to agree upon terms the commission will fix them in a manner taking due account of prevailing market conditions relevant to the price to be paid, as well as reasonable compensation for the use of Republic's facilities. With those limitations properly applied, it is hard to see what great business risk will be shifted to Republic."(11)

No corresponding power exists under the Natural Gas Act. The Federal Power Commission cannot adjust Continental's rate downward to a level which, taking due account of market conditions, will afford United a reasonable compensation for the use of its facilities. Neither can the Federal Power Commission adjust United's rates upward

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(11) 334 U.S. at page 99.

to guarantee United reasonable compensation; for, under *Mobile*, proof of a non-compensatory rate does not empower the Commission or United to adjust United's jurisdictional rates without the customers' consent, and the Commission has no rate jurisdiction of direct industrial sales.

Under the Act gas is sold by contract, and if increased costs render existing jurisdictional rates less than compensatory, as was the case in United's sale in *Mobile*, the Commission cannot authorize United to increase that rate to one that is just and reasonable. And United sells 43 per cent of its gas directly to industrial consumers for their own use. If increased costs render the existing rates for those sales less than compensatory, the Commission can take no cognizance of that fact whatever.

Moreover, United operates in gas producing states (Texas and Louisiana) where unregulated competition from intrastate suppliers of natural gas is real and highly effective. Untold numbers of producers in these states are willing and anxious to dispose of their natural gas reserves in intrastate commerce where producers' rates are not regulated and certificates to sell are not required. United has lost to this competition numerous industrial and resale customers it had previously served for years. United must strive to keep its markets in the face of this competition without any protection or assistance from the Commission under the Natural Gas Act. This was force-

fully demonstrated to United by a recent decision of the Commission.

In September, 1963, United filed a complaint with the Commission asking that it protect the interstate service United was rendering the City of Tyler, Texas, under a certificate granted by the Commission. To do this the complaint asked the Commission to order a producer not to take the Tyler market from United by supplying unregulated intrastate gas at a lower rate than United's federally controlled rate. The Commission dismissed the complaint as beyond its competence solely because the competition was from an intrastate supplier.[12]

United must strive to keep its markets and to earn a fair return and it can do either or both only if it controls its costs and keeps its rates low enough to cause its customers to continue to buy from United. The Commission's order not only makes no provision for compensating United for the taking of its property, it actually denied United the right to control its costs and thereby denies United the opportunity effectively to keep its markets and earn a fair return.

United's property, in the form of cash and pipeline facilities, has been taken without any provision for adequate compensation to United for such taking. United denies that the Act authorizes this, but if it does the Act is to that extent violative of the Fifth Amendment to the Constitution of the United States.

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(12) The Commission's decision is reported at 30 F.P.C. 1196.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

Natural Gas Act

Section 1. (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or pre-

decessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of any application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service

proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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Number 49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT CONTINENTAL OIL COMPANY

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BRIEF OF RESPONDENT CONTINENTAL OIL COMPANY

I.

STATUTES INVOLVED

Sections 1(a), 1(b), 4(c), 4(d), 4(e), 5(a), 7(b), 7(c) and 7(e) of the Natural Gas Act; 52 Stat. 821 *et seq.*, as amended; 15 U.S.C. §§ 717(a), (b), 717c(c), (d), (e), 717d(a), 717f(b), (c), (e). These sections are reproduced in the Appendix hereto (*post* pp. 1a *et seq.*).

II.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, upon expiration of a contract covering a jurisdictional sale of gas, the pipeline purchaser is

required by the Natural Gas Act to continue purchasing gas, just as the producer-seller is required to continue selling gas, unless and until abandonment is authorized by the Federal Power Commission pursuant to Sec. 7(b) of the Act.

2. Whether a pipeline natural-gas company may abandon its certificated gas purchase facilities, and the service rendered by such facilities, without authorization for such abandonment by the Federal Power Commission pursuant to Sec. 7(b) of the Natural Gas Act.

III.

SUPPLEMENTAL STATEMENT

United Gas Pipe Line Company (United) describes the price provisions of the contract Continental Oil Company (Continental) sought to negotiate with United as ". . . a new series of prices reaching 18.75¢ per Mcf . . ." (United Br. p. 4). Such provisions were more accurately summarized by United's Vice President, as follows: "The increased price was to begin at a level of 14 cents per Mcf plus 1.75 cents per Mcf tax reimbursement for the first five years of the contract, and thereafter the price would increase one cent per Mcf each five years thereafter . . ." (R. 14). It was only after 15 years that the price would reach 18.75 cents per Mcf, inclusive of tax reimbursement. The Johnson Bayou Field will be depleted in about 16 years (R. 66).

While United's Statement relates that United filed a complaint with the Commission protesting Continental's unilateral rate filing and asking that it be rejected (Br. p. 5), United omits any mention of the following facts: United did not complain of the level of Continental's proposed new rate, which was the lowest guideline rate set by the Commission for "old" gas in South Louisiana (18 CFR § 2.56). United sought rehearing of the Commission's order which

accepted Continental's rate filing and made the new rate effective; but upon denial of rehearing, United failed to seek court review (R. 23). Therefore, United is now precluded from complaining about the Commission's acceptance of the rate filing, the level of the rate, or the lawfulness of the rate.

IV.

ARGUMENT

1. As required by the public interest, Sec. 7(b) of the Natural Gas Act vests the Commission with jurisdiction over abandonment of gas purchase facilities, or services rendered by means of such facilities, regardless of whether the abandonment is attempted by a producer or a pipeline.

The public interest in an adequate supply of gas at reasonable rates gave rise to the passage of the Natural Gas Act.[1] Continuing supply and reasonable rates are the two objectives of the Act. This transcending interest and purpose dictated the conclusion reached by the Commission and the Court below.

Gas consumers are protected, so far as continuing supply is concerned, by Sec. 7(b) of the Act, which prohibits abandonment, without FPC permission and approval, of any jurisdictional "purchase facilities"[2] of a "natural-gas company" (whether a producer or a pipeline), or any service rendered by means of such facilities. The consumer's protection against excessive rates is provided by Secs. 4(c), (d) and (e), 5(a), and 7(c) and (e).

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[1] Sec. 1(a); 52 Stat. 825 (Section 7(c) as originally enacted); *United Gas Pipe Line Co.*, 3 FPC 3, 8, 9.

[2] Field facilities are called "purchase facilities" in the Commission's Rules (18 CFR § 2.58) and Regulations (18 CFR § 157.7).

Under United's contention, the Commission would have jurisdiction to protect the public interest only with respect to the reasonableness of rates, leaving the consumer without supply protection if the pipeline does not deign to provide such protection. But if the consumer cannot get the gas he needs, it makes no difference whether it was the producer or the pipeline who cut off his supply.

Pipelines certificate their facilities on the basis of the gas supply dedicated to them. In turn, distribution companies build their facilities in reliance upon receipt of those supplies. Ultimately, the individual consumer installs gas-consuming appliances upon the same reliance. The initial certificate would not have been issued, the distribution facilities would not have been built, and the consumer would not have bought the appliances in the absence of firm supply commitments. Accordingly, the consequences of permitting abandonment when gas sales contracts expire must be controlled by the Commission, not the pipelines.

Under United's construction of the Act, substantial dedicated reserves of gas still in the ground upon expiration of thousands of gas purchase contracts would remain committed to interstate commerce, and to consumers who acted in reliance upon those reserves, purely at the election, or even the whim, of the pipeline purchaser. Clearly, this is not and should not be the law.[3]

2. The equities as between the producer and the pipeline.

Virtually all gas sales contracts provide for their eventual termination. Some expire automatically; others may be terminated by either party. But however a contract may come to an end prior to depletion of the dedicated reserves, entirely different consequences follow (1) where only the

[3] *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 143.

seller is obligated to continue to sell, and (2) where the seller must continue to sell and the buyer must continue to buy.

Under alternative (1) the seller's immediate and drastic prospects are loss of revenue, loss of reserves through drainage, and loss of the gas lease itself. United fails to recognize that practically all oil and gas leases provide that once production is commenced it must continue without cessation of more than 60 or 90 days, unless drilling operations are being conducted on the lease. See, for example, the Johnson Bayou lease provision at R. 171. The penalty for failure to comply with this lease provision is, as in the example, forfeiture of the lease. Under these circumstances, the seller would have no bargaining position whatever upon contract termination, and would then be at the absolute mercy of the buyer. This is precisely the happy position United thought it occupied when it insisted that Continental continue to sell its gas to United for 10.79 cents per Mcf, including tax reimbursement, until final depletion of the reservoir. United was perfectly willing to buy this gas at half of its going market price,[4] but did not "need" or want the gas at any higher price, no matter how just and reasonable that price might be.

Sooner or later United will have to replace the Johnson Bayou gas; and United openly admitted that such gas could not be replaced for 10.79 cents per Mcf (R. 58). Indeed, it is obvious that United could not replace such gas even at the bargain price at which Continental was willing to sell — 14 cents plus 1.75 cents tax reimbursement. Also obvious is the fact that United was attempting to exploit its inequitable position in its own economic interest and in complete disregard of the public interest.

---

[4] The Commission's "in-line" or "guide line" rate at the time for South Louisiana was 21.25 cents per Mcf (18 CFR § 2.56, as amended.)

Under United's construction, when a gas purchase contract expires, the pipeline-buyer is relieved of all obligations and hence requires no remedy. But what, then, are the remedies of the producer-seller? He has only two choices: (a) he can, of course, yield to the dictates of the buyer and sell on the buyer's terms, or (b) he can seek permission to abandon further sales to the buyer. In the latter event, the seller has no assurance that abandonment will be authorized, but he faces the certain consequences of loss of revenue, drainage, and probable loss of his lease while prosecuting his application to abandon. Moreover, abandonment is often no cure for the seller's plight because, as was the case here, there is then available no other purchaser for the seller's gas. Under alternative (1), therefore, the seller is deprived of all equities.

Under alternative (2) the equities are balanced. The parties then negotiate on even terms without fear of loss of property or markets. If negotiations fail, either or both parties can seek abandonment. It is true that the seller is meanwhile free to file a unilateral rate, but the buyer is well protected as to rate and is not deprived of his property without due process of law. The buyer receives gas, his stock in trade, at a just and reasonable rate. This rate is not one that the seller has "power to fix" (United Br. p. 18); it can only be one which is authorized by the Commission. The buyer can protest the rate if it is not satisfactory and can take steps to force a rate hearing under Section 4(e). The Commission thereupon scrutinizes the rate once again. If deemed to be too high, the rate filing may be rejected, or its taking effect may be suspended, with any collections subject to refund at interest pending a hearing in which the seller has the burden of proving the rate to be just and reasonable. The 7% interest currently prescribed by the Commission for exces-

sive rate collections is a powerful deterrent to irresponsible unilateral rate filings. Under alternative (2), therefore, both parties have appropriate remedies and the consumer is at all times protected as to continuity and adequacy of supply as well as to propriety of rates.

The issues United attempts to raise respecting its supply, take or pay obligations, and cost control position might have some relevance if United had here availed itself of the remedy which is open to it at all times, to-wit: a proceeding upon an application to abandon. But those issues cannot be resolved in the present posture of this case.

3. The applicable case law requires affirmance of the judgment below.

Three fundamental fallacies lead to United's misconstruction of the case law. To begin with, United erroneously asserts that all gas sales must be pursuant to contract. Secondly, United ignores the distinction between an *initial* purchase and the *continuation of an existing* purchase. And, thirdly, United argues illogically that because the word "purchase" appears in neither Section 1(b) nor Section 7(b), the Commission has no jurisdiction over gas purchases or purchasers. These fallacies become readily apparent in the light of legal precedent and common sense.

The *Sunray* case[5] annihilates United's arguments. Indeed, the *Sunray* opinion could, with very slight modification, serve as the opinion in the case at bar. Both cases involve the identical question: May jurisdictional gas service be abandoned without FPC approval? It makes no difference whether this question be considered (as in our case) from the pipeline-purchaser's standpoint, or (as in *Sunray*) from

[5] *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137. See, also, the companion case of *Sun Oil Co.* v. *FPC*, 364 U.S. 170.

the viewpoint of the producer-seller. A "purchase" is inseparably a part of every "sale"; "purchase" and "sale" are but opposite sides of a single coin. Regardless of the side approached, the answer to the question must be the same.

Both United and Continental are "natural-gas companies" within the meaning of the Act, and, as such, both perform a service to the public. The Commission clearly has jurisdiction over both parties and over whatever public service each is rendering. United says, in effect, that as to the pipeline-purchaser this jurisdiction continues only so long as the gas purchase contract continues, because all gas purchases must be by contract. This same argument was expressly rejected in *Sunray:*

> "Under petitioner's theory, the abandonment provisions of Sec. 7(b) would have application only if it was desired to abandon service while the contract was still in effect.
>
> "The argument seems to us unpersuasive even on the face of the statutory language." (364 U.S. at p. 148)
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> * * *
>
> "Further, the Power Commission has from an early date taken the view that there is a continuing obligation to perform 'service' imposed by the Act which outlasts the term of a seller's original contract of sale. As early as 1942 it held that an abandonment of service after the expiry of such a contract had to have Commission approval under Section 7(b). United Gas Pipeline Co., 3 F.P.C. 3, 9." (at pp. 153-154)
>
> * * *
>
> "The obligation that petitioner will be under after the contract term will not be one imposed by contract *but by the Act.*" (at p. 155; italics supplied)
>
> * * *
>
> "The short of the matter is that Mobile [350 U.S. 332] recognized that there were two sources of price and

> supply stability inherent in the regulatory system established by the Natural Gas Act — the provisions of private contracts and the public regulatory power. * * * Petitioner now urges an application of that decision that could make private contracts the only stabilizing factor under the Act." (at pp. 155-156)

United fails to recognize the distinction between an *initial* purchase and the *continuation of an existing* purchase. No one here contends that the Act confers power on the Commission to order a pipeline to make a particular initial purchase. But when "service" commences by means of a "purchase," the power of the Commission attaches to that "service" and is not relinquished unless and until the Commission authorizes discontinuance. It matters not that the word "purchase" nowhere appears in either Sec. 1(b) or in Sec. 7(b), nor that no certificate is requisite to initiate a "purchase." Such a certificate would be superfluous in view of the certificate requirements respecting the "sale" half of the transaction, and the further certificate requirements for the installation and operation of purchase facilities and for the conduct of transportation by which the purchase and sale transaction is effectuated. United cannot deny that in entering this long-term purchase arrangement with Continental, in installing the facilities necessary to accept delivery of the gas so purchased, and in operating those facilities and transporting the gas to customers, United was not performing a "service." *Sunray* is likewise dispositive on this point:

> ". . . petitioner's contention depends on the assumption that the provisions relied upon speak only in terms of the specific 'sale' contemplated by the parties and not in terms of a 'service' in the movement of gas in interstate commerce, of which 'service' the initial 'sale' is the commencement. For under Section 7(e) the Commission is authorized to issue a certificate authorizing

the 'service' covered by the application, as well as a 'sale'; and since Section 7(c) [footnote 15 omitted], which details the acts for which a certificate is a prerequisite, sets forth no specific antecedent for the 'service' to which Section 7(e) refers, it might well be thought that one who 'engage[s] in the transportation or sale of natural gas,' which Section 7(c) does refer to, is performing a 'service' within the meaning of Section 7(e). Certainly there is no more likely antecedent in Section 7(c). The structure of Section 4(c) presents the same feature,[16] and that of the abandonment provisions of Section 7(b) themselves[17] looks the same way.

"Furthermore, within Section 7(e) itself, there is found the further requirement to which petitioner itself points — that with respect to an application for a certificate of any nature, a two-part finding must be made: that the applicant is willing and able 'to do the acts and to perform the service proposed.' Thus, it is evident that all the matters for which a certificate is required — the construction of facilities [United received a certificate for construction of the purchase facilities here involved] or their extension, as well as the making of jurisdictional sales — must be justified in terms of a 'service' to which they relate. Accordingly, Section 7(e) itself gives positive indication that the 'service' which the Commission's certificate may au-

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"[16] Not only does Section 4(c), • • • contain a reference to 'services' in a context where the antecedent must be 'transportation or sale,' but it recognizes that a 'contract' may 'affect or relate to' such services."

"[17] It will be noted that Section 7(b) does not refer to the abandonment of the continuation of sales, but rather to the abandonment of 'services.' • • • Accordingly, if petitioner was correct in saying that its contract did not involve a 'service', it would be difficult to see the applicability of the abandonment provision even during the term of the contract, when petitioner concedes it is applicable."

thorize is something quite apart from simply the specific sales which Section 7(c) forbids without a certificate sufficient to authorize them. To be sure, Section 7(e) requires that the applicant be found willing to perform the 'service' in question; but surely such willingness can be inferred from its willingness to enter into a long-term sales contract." (364 U.S. at pp. 149-151)

* * *

"It [the Commission] has long drawn a distinction between the underlying service to the public a natural gas company performs and the specific manifestation — the contractual relationship — which that service takes at a given moment. * * * This position of the Power Commission is evidence that the service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service." (at pp. 152-153)

The Court in *Sunray* dealt fully with the adverse consequences to the public if a producer were permitted to control the duration of his sale or service. The identical consequences would follow if the buyer were permitted to control the duration of his purchase or service. In fact, if United's contention should be upheld, the very purpose of section 7(b) would be defeated, and the entire fabric of the *Sunray* case would be destroyed.

United seeks to undermine the Act and the *Sunray* doctrine on the tenuous basis of four unnecessary, but explainable, words, and one sentence of dictum found in the *Sunray* opinion. As to the four words, this Court said that petitioner "will be under an obligation to continue to deliver gas to United *on the latter's request* unless it can justify an abandonment" (364 U.S. at p. 155 italics supplied). But how else can gas be "delivered" than "on the latter's [pipeline's] request"? That is precisely how all gas is "delivered" to all pipelines. There is only so much room in a given pipe-

line, and there must be room for the gas "delivered" into that line. Also, the volume of gas a pipeline may need at any given time depends upon the then available market. From wellhead to burner tip, it is always the buyer who elects the timing and quantity of gas to be "delivered."

Moreover, in *Sunray* this Court was considering post-contract obligations in the context of the facts there presented, namely, that the seller did not want to sell, but the buyer *did* want to buy. The reverse side of the coin appears in the case at bar. We conclude that by using the four words "at the latter's request," this Court neither made the obligation of the producer to *sell* nor the obligation of the buyer to *purchase* dependent upon the pipeline's *request;* such *request* referred simply to the amount of gas to be *delivered* from time to time.

The single sentence of dictum relied on by United is this: "It is said that the petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it." (364 U.S. at p. 155). The Court then went on to muse over the bargaining strength of each party. We have already dealt fully with this aspect of our case in Section 2, *ante,* pp. 4-7. Obviously, this Court did not intend by one sentence of dictum to detract from the entire substance of the holding in *Sunray.* United's contention to the contrary illustrates the illogical result that can be reached by lifting a few words from their context.

That the prohibition against unauthorized abandonment is intended to apply to pipelines as well as to producers is made evident in *Sunray:*

> "When attached to the leverage of a power to abandon service, at a contract's termination, without con-

> temporaneous Commission approval, this power to exercise contractual control not only over rates but over the mode of their regulation, would be a substantial one indeed. And, like the power to force an advance license for the abandonment of the continued supply of gas, *the power would be one enjoyed by pipeline companies and producers alike.*" (364 U.S. at p. 147; italics supplied)
>
> • • •
>
> "Moreover, once so dedicated there can be no withdrawal *of that supply* from continued interstate movement without Commission approval." (at p. 156; italics supplied)

Just as this Court held in *Sunray* that *Mobile*[6] was beside the point (364 U.S. at pp. 155-156), so it is beside the point here. *Mobile* dealt with the binding effect of a gas sales contract during its term, not with a situation, as here, where the provisions of the Act have superseded the terminated contract.

The *Memphis* case[7] merely supports Continental's right to file unilaterally a changed rate when not precluded by contract. Here, one party is a producer, the other a pipeline, and both are "natural-gas companies" under the Act. In *Memphis,* one party was a pipeline "natural-gas company"; the other a distributor which was not a "natural-gas company" over which the Commission had jurisdiction.

Panhandle[8] is no more help to United than *Mobile* and *Memphis.* In *Panhandle* the jurisdiction of the Commission never attached, as was more fully explained in the

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[6] *United Gas Pipe Line Co.* v. *Mobile Gas Corp.,* 350 U. S. 332.

[7] *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103.

[8] *F.P.C.* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498.

Rayne case.[9] Since the leases were not developed in *Panhandle,* there was no sale of gas to which a "service" could attach; and in any event the lease sale was not to an interstate pipeline company, nor made in interstate commerce. The Commission in *Panhandle* contended for implied jurisdiction which, under the facts of that case, could not exist. Here, the jurisdiction is explicit as to both "natural-gas company" parties, as to the "service" rendered by United in purchasing and transporting gas, and as to the construction and continuing use by United of the facilities certificated for those very purposes.

CONCLUSION

For the foregoing reasons the judgment of the Court below should be affirmed.

Respectfully submitted,

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[9] *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 403-404.

CERTIFICATE OF SERVICE

I, Bruce R. Merrill, who has entered my appearance in this cause, hereby certify that I have in accordance with Rule 33 of the Court, this date served by mail three copies of the foregoing brief on counsel for petitioner United Gas Pipe Line Company, Solicitor for the Federal Power Commission, Howard E. Wahrenbrock, and the Solicitor General of the United States.

Dated at Houston, Texas, this 6th day of September, 1966.

BRUCE R. MERRILL

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APPENDIX

* * * * *

NATURAL GAS ACT

SECTION 1.(a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717(a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

* * *

SEC. 4(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts

which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference

thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

* * * * *

SEC. 5(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any state, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be there-

after observed and in force, and shall fix the same by order; *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * *

SEC. 7(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made

and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]*

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* As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation

• • •

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

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of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enarge or extend its facilities for the purpose of suppying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, *it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))* (italics supplied)

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 49

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND
CONTINENTAL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 485-501) is reported at 350 F. 2d 689. The opinion of the Federal Power Commission (R. 395) is reported at 31 F.P.C. 1079; its opinion on rehearing (R. 459) is reported at 32 F.P.C. 8.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1965 (R. 502), and a timely petition for rehearing denied on October 8, 1965 (R. 505).

The petition for a writ of certiorari was filed on January 3, 1966, and granted on February 28, 1966 (R. 506, 383 U.S. 924). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 717r(b).

QUESTION PRESENTED

Upon the expiration of its contract to purchase gas from Continental Oil Company in the Johnson Bayou Field in Louisiana, United Gas Pipe Line Company desired to discontinue further takings of gas from this source, and accordingly shut down the facilities it had constructed to enable it to take the gas. The basic question presented is whether United was required to obtain the Commission's approval of this step.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are set forth in the Appendix, *infra*, pp. 29-33.

STATEMENT

In the order under review, the Federal Power Commission found that the action of United Gas Pipe Line Company in ceasing to accept deliveries of natural gas from Continental Oil Company in the Johnson Bayou Field in Louisiana was an unauthorized

abandonment under Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), and directed United to resume.[1] The facts giving rise to the order may be briefly summarized.

On January 22, 1953, Continental and United executed a contract for the sale and purchase of gas from the Johnson Field for a primary term of 10 years commencing January 31, 1953, the contract to continue in effect after the end of the 10-year term on an annual basis with either party free to terminate by giving 90 days' written notice (R. 181, 196, 396). The Johnson Field is adjacent to United's 16-inch Mud Lake transmission line, which extends westward from Southwest Louisiana into Texas. The contract provided that Continental was to deliver the gas to a central point near this line. To effectuate delivery, Continental constructed 4,400 feet of 2½ inch pipe line, two separators, and several storage tanks, while United constructed another separator, a meter station, about 55 feet of 4-inch pipeline, and valves.[2]

Since gas covered by the contract was to be transported in interstate commerce for resale (R. 397), United applied in September 1954 for a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c) (App., *infra*, p. 32) authorizing the transportation of gas

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[1] Authority to issue such orders is granted the Commission by Section 16 of the Act, 15 U.S.C. 717*o*.

[2] The total cost of the facilities constructed by United was $6,884 (R. 397).

from the Johnson Field and the operation of the facilities constructed by United for that purpose. On February 25, 1955, the Commission issued United such a certificate. *United Gas Pipe Line Co.*, 14 F.P.C. 582. Similarly, Continental, on November 30, 1954, filed the sale and purchase contract with the Commission (R. 397), which, on January 4, 1956, issued Continental a certificate of public convenience and necessity authorizing the sale, and the operation of the facilities constructed by Continental to make the sale. *Continental Oil Co.*, 15 F.P.C. 1650.

On October 23, 1962, Continental gave notice of its intention to terminate the contract at the end of the primary term on January 31, 1963 (R. 397). After attempts to negotiate a new contract failed, Continental filed a supplement to the rate schedule that it had filed with the contract. The supplement provided for an increase in price to 14 cents per Mcf (plus 1.75 cents for tax reimbursement), which Continental proposed to make effective on January 31, 1963 (R. 397-398).[3]

Over United's objection, the Commission accepted the increased-rate filing. The Commission did not suspend the increased rate (as Section 4(e) of the Act, 15 U.S.C. 717c(e), empowers it to do, for a period not to exceed five months, pending a hearing on the reasonableness of the changed rate), since the new price was the area guideline price for increased rates

[3] The contract price applicable to sales after January 31, 1958, had been 8.997 cents per Mcf plus tax reimbursement (R. 195, 397).

and United did not suggest that it was unjust or unreasonable. *Continental Oil Co.*, 29 F.P.C. 525, 526.[4]

After Continental filed its increased rate, United notified Continental that it would cease purchasing from the Johnson Bayou Field at 7:00 a. m., January 31, 1963[5] (R. 251, 398); and it did.[6] On February 1, 1963, Continental asked the Commission to direct United "* * * to show cause why it should not be required to continue to take deliveries of gas produced by Continental in the Johnson Bayou Field * * * at the currently filed and effective rate," and to order United to continue taking the gas in the meantime (R. 242, 398). The Commission declined to order interim relief but directed United to show cause "why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental * * *" (R. 267-271, 398-399).

After a hearing, the presiding examiner rendered his initial decision, vacating the Commission's order to show cause (R. 324-334). On exceptions, and after oral argument, the Commission held that United's

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[4] United did not seek judicial review of the Commission's order accepting Continental's increased-rate filing.

[5] United stated that if Continental desired to continue delivering gas at the price provided by the terminated contract, it should notify United (R. 252).

[6] It resumed purchasing only when the Commission so ordered it (see p. 6, *infra*) and the court of appeals refused to stay the order.

refusal to make any use, for an indeterminate time, of the facilities for the purchase of gas from Continental constituted an unauthorized abandonment within the meaning of Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b). The Commission ordered United to resume purchasing gas at the filed rate (R. 407, 408). The Court of Appeals for the Fifth Circuit, on September 8, 1965, upheld the Commission's order.

ARGUMENT

Introduction and Summary

A.

In the Natural Gas Act, Congress legislated a comprehensive scheme for the regulation of the natural gas industry by the Federal Power Commission. The congressional purpose was basically twofold. On the one hand, Congress desired to protect consumers of natural gas from abuses—principally in the form of exorbitant rates—of the economic power often enjoyed by natural gas companies. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610-612. To this end, the Commission was given broad authority over rates, for example in Section 4(e) of the Act, which empowers the Commission to suspend increased rates for five months pending hearings in which the burden is upon the natural gas company to establish that the increased rate is just and reasonable.

But it is apparent that Congress had a broader objective as well—to promote efficiency, prevent waste, and, in general, foster sound economic conditions in the gas industry. The principal implement-

ing provision is Section 7. Under that section no company may—without the Commission's approval—engage in the transportation or sale of natural gas within the Commission's jurisdiction; construct, extend, acquire, abandon or operate any facilities used in that transportation or sale; or abandon a service rendered by means of any such "jurisdictional" facilities.[7] The Commission thus has extensive powers to prevent excessive entry into the industry, unnecessary duplication of facilities, and imprudent or precipitate expansion, and to encourage maximum utilization of existing facilities. The basic question in the present case is whether these regulatory objectives require that a pipeline company seek Commission approval in order to discontinue the transportation of gas after expiration of its contract with the producer of that gas.

B.

United Gas Pipe Line Company (petitioner) entered into a contract to purchase gas from Continental Oil Company in the Johnson Bayou Field in Louisiana. To provide direct delivery to United's existing pipeline, each company constructed additional facilities. The contract was to run for 10 years. Toward the

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[7] The abandonment provision has a specific function in the scheme of the Act in addition to the promotion of sound conditions generally—to prevent a natural gas company from using threats to abandon service as a method of coercing the other party to the contract into accepting unfavorable terms. See Hearings on H.R. 11662 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., p. 92. While this purpose normally relates more to a pipeline's dealing with its customers, it is also

end of this period, Continental filed a new, increased rate to take effect upon expiration of the contract. The Commission held that United, unless it brings a proceeding under Section 7(b) (abandonment), must continue to take gas from Continental in the Johnson Field as before; and that, unless the rate increase put into effect by Continental is suspended or reduced by the Commission, it is the lawful rate and United must pay it. United contends that these rulings are error.

The issue has two fundamental aspects. The first is whether the requirement of obtaining the Commission's approval for abandoning jurisdictional facilities (or a service rendered by means of them) is applicable where the facilities relate primarily to the purchasing of the gas from the producer. The second is whether, if so, it makes any difference from the standpoint of the Commission's power that the facilities were originally constructed in performance of a contract that has since expired. This in turn raises a subsidiary question—what rate is applicable to post-contract deliveries which United, not having sought authorization to abandon, is required to take?

We start from the proposition that Section 7(b) is applicable in terms to an abandonment of *all or any portion* of a natural gas company's jurisdictional facilities and to *any* service rendered thereby. There can be no doubt that United's conduct in terminating deliveries constitutes an abandonment of the delivery facilities that it constructed, as well as of the service

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relevant where the pipeline uses the threat of abandonment to coerce a producer (which cannot abandon without Commission approval, see p. 24, *infra*) to continue to accept a very low contract price.

rendered by means of those facilities. It is also clear that the facilities and service in question are within the purview of the statute. The facilities are jurisdictional. United was required to (and did) obtain from the Commission a certificate of public convenience and necessity for their operation and for the transportation of gas by means of them. In addition, regulation of such abandonments is necessary to effectuate the Commission's recognized authority over abandonments of producers' facilities and to achieve fully the regulatory objectives of Section 7. Conduct like United's, as we shall demonstrate, may frequently entail wastage of gas, unnecessary expenses by pipeline and producer for substitute facilities, inefficient pipeline service, and higher costs to consumers.

It is immaterial that Congress has not required Commission approval of gas purchases as such. There was no occasion to grant such power, since the Commission's authority over the transportation of gas subsumes broad regulatory power over purchasing. In addition, it is a familiar principle of public utility regulation, and one plainly intended by Congress to be incorporated in the abandonment provisions of the Gas Act, that discontinuance of a service may be subject to regulation even where initiation is not—this because of the dependence on an existing utility service that consumers develop.

Nor is the Commission's power over United's abandonment affected by the fact that the service in question was initiated pursuant to a contract. The contract was never intended to govern the relations of the parties after its termination—the issue here; nor

may regulated gas companies curtail the Commission's statutory duties by contract.

Since the contract has expired, it follows, we believe, that the current lawful rate is the rate newly filed by Continental. That rate has not been suspended (indeed, its reasonableness has not been questioned), and it must govern unless and until the Commission authorizes abandonment of the underlying service or affirmatively exercises its rate-making powers under Section 5.[8]

C.

We advert to a further consideration—although it is not an issue directly presented by this case—whether United will pay more for its gas if its claim of a unilateral right to abandonment is rejected. Its contract with Continental having expired, United will in no event be entitled to purchase gas at the low rate fixed in the contract. That it can obtain substitute gas below the increased rate filed by Continental is more than doubtful; that rate does not exceed the ceiling that the Commission has fixed for producers' increased rates in the area in question. (If Conti-

[8] United also raises a constitutional question. It argues that if the Act forces it to buy gas on terms unilaterally imposed by the seller, without consideration of its needs as a buyer, there is a taking without compensation in violation of the Fifth Amendment. But this issue is clearly premature. United has yet to challenge the rate filed by Continental or to ask the Commission for permission to abandon. As noted in the text, below, the Act provides United with adequate remedies against being forced to take gas on disadvantageous terms; having sought none of these remedies, United is in no position to contend that it is being deprived of a property right without adequate compensation.

nental's new rate had exceeded the ceiling, the Commission would have suspended it.) In fact, United, before the Commission ordered it to resume taking Continental's gas, was apparently paying more for gas, not less, than if it had continued to purchase from Continental at the increased rate.[9] It should also be noted that if Continental's new rate were excessive, that in itself would be a persuasive basis for United's seeking permission to abandon under Section 7(b) or inviting the Commission to reduce the rate. It has followed neither course.

We note these considerations in order to stress the Commission's ample authority to protect, over the course of the post-contractual dealings between pipeline and producer, both the parties and the public. The nub of this case is whether that course of dealings is to be controlled by the Commission, acting in the public interest, or by the pipeline's unilateral decision to terminate. The facts of the present case indicate that the latter method is not likely to result

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[9] That rate is 15.75¢, and the record shows that while United was declining to take gas from Continental at that rate it was entering into some new purchases of gas at prices ranging from 18¢ to 19.75¢ (R. 23-27, 33). This may reflect the fact that rates for initial (new) service are ordinarily higher than rates for old service. Thus, the Southern Louisiana guideline price announced on October 25, 1960, for initial service was 21.5¢ exclusive of tax reimbursement. This was changed on October 31, 1961, to 21.25¢ inclusive of State taxes. Fourth Amendment to Statement of General Policy No. 61-1, 26 F.P.C. 661. The guideline price for rate changes has, since September 28, 1960, remained fixed at 14¢ exclusive of tax reimbursement of 1.75¢. Statement of General Policy No. 61-1, 24 F.P.C. 818.

in lower costs to the pipeline's ratepayers.[10] And one can readily conceive of instances where such termination would be improvident and harmful from the standpoint of the total health of the industry. At all events, we believe it clear that such decisions are not to be left to unfettered private choice.

I

It Is an Abandonment within the Meaning of Section 7(b) of the Natural Gas Act for a Pipeline to Cease Taking Deliveries of Gas for Transportation by Facilities within the Commission's Jurisdiction

A. *The Language of the Statute Clearly Compels This Result; So Does Its Purpose—to Prevent Waste and Inefficient Plant Utilization*

1. Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

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[10] It is true that there are indications (see R. 23-27, 33) that United's purchases at rates higher than Continental's post-contract rate may not have been substitute purchases. But this is precisely the kind of fact question that could be fully developed only in an abandonment proceeding.

It is not open to serious doubt that United's action in terminating receipt of gas from Continental's Johnson Bayou Field constitutes an abandonment. To be sure, United has not removed or altered the facilities it constructed to receive the gas, but Section 7(b) does not require dismantling. It is enough that a service has been cut off indefinitely. *Panhandle Eastern Pipe Line Co.* v. *Michigan Consol. Gas Co.*, 177 F. 2d 942 (C.A. 6). Whether there is intent to resume seems of doubtful relevance, but in any event the record shows that United had no present intention of resuming (R. 401-402).

It is also clear that this was an abandonment of facilities subject to the Commission's jurisdiction. It is undisputed that the pipeline and other facilities installed by United to take gas from Continental at the Johnson Field were intended to be, and were, used for "the transportation of natural gas in interstate commerce" and hence were subject to the Commission's jurisdiction (Section 1(b), 15 U.S.C. 717(b)). Nothing in Section 7(b) suggests a basis for distinguishing facilities used in a pipeline purchase of gas from other facilities of the company. The statute applies to "all or any portion of" a natural gas company's facilities. "Purchasing" facilities are obviously a vital part of a pipeline company's plant; without them the company could not render a transmission service. Furthermore, it is inherently ambiguous—if not meaningless—to attempt to separate "purchasing" from "transmission" or "resale" facilities. A pipeline company's facilities compose a continuous system for the transportation and sale of gas.

It is surely immaterial that in the present case the cost of the facilities installed by the pipeline company was slight. In the first place, the present case may not be typical in this respect. Secondly, we again point out that the statute speaks of "all or any portion" of the natural gas company's facilities. It does not exempt those that are relatively inexpensive. Nor would such a standard be practicable.[11] Furthermore, the statute expressly embraces the abandonment of the *service* rendered by means of jurisdictional facilities. United abandoned not merely physical facilities, but the transportation service being rendered by means of them. While the facilities may have been inexpensive to construct, the service undoubtedly involved a considerable volume of gas having substantial monetary value.

2. To carve an exception to Section 7(b) for facilities and service such as are involved here, and to permit their unregulated abandonment, would subvert the regulatory scheme and the objectives of Section 7.

(a) As we have already suggested (pp. 6-7, *supra*), the plan of Section 7 is to prevent unnecessary or imprudent plant investments and to assure the most efficient utilization of existing facilities. Section 7(c) thus requires that a natural gas company desiring to construct new facilities or initiate

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[11] We also point out that the practical economic effect of the abandonment may be to render useless costly facilities that were constructed by the producer. The facilities constructed by Continental were far more extensive than United's. Statement, *supra*, p. 3.

a new service satisfy the Commission that the step is justified by the public convenience and necessity. Section 7(b), in requiring a similar showing for abandonment of facilities or services, is complementary. If a natural gas company were free to abandon perfectly adequate facilities, the Commission's task under Section 7(c) would be much complicated. It might be forced to approve new facilities that were not actually necessary, simply because the company had imprudently abandoned existing facilities that would have served as well or better. Proper administrative supervision of additions to or extensions of plant requires commensurate control over abandonment of the facilities that may have to be replaced.

United was required by Section 7(c) to obtain the Commission's approval to operate the facilities used to take gas from Continental and to transport gas by means of these facilities. See *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143 (C.A. D.C.). It would be anomalous to deny the Commission equal authority over the abandonment of the same facilities and service. Presumably, United, if it abandons an existing source, must eventually obtain replacement gas elsewhere, and it will then have to get the Commission's approval for the requisite new facilities and transportation service. The public convenience and necessity may not, however, justify the switch. If the Commission is to retain unimpaired power to prevent the construction of unneeded facilities or the initiation of a superfluous service, it must be able to prevent the premature abandonment of

existing facilities and services which may be wholly adequate and even—from a public interest standpoint—superior to the available substitutes.

(b) Failure to recognize the Commission's authority to prevent abandonments of pipeline "purchasing" facilities would undermine the scheme of the Act in another respect. This Court has held that producers' sales are fully subject to Section 7(b). *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137. But the Commission's function with respect to such abandonments could in many cases be nullified if petitioner's position here prevailed. For then a producer's facilities could be rendered useless by the unilateral action of the pipeline in refusing to purchase beyond the termination of the contract, even though the Commission would not otherwise have permitted abandonment by the producer.

(c) Finally, it is demonstrable that the fundamental regulatory objectives of Section 7—conservation, efficiency, economy of plant—will be impaired if Section 7(b) is denied its literal force and "purchasing" facilities are excepted from its reach.

(1) A pipeline's termination of gas deliveries from a producer may result in a substantial and unjustified wastage of gas. If a new purchaser cannot be found (as might be true if the remaining reserves were limited), the wells will be shut down before the supply has been exhausted. The relevance of this factor to the legislative scheme is plain, for if a natural gas company can show that the available gas supply is so far depleted as to make continuance of the service

unwarranted, it has (under the express terms of Section 7(b)) an absolute right to abandon. Moreover, even if the remaining supply is not permanently lost, abandonment by a regulated pipeline company may result in a permanent diversion of the gas from the interstate market, thereby harming the consumers whom the Act was intended to protect.

(2) The premature abandonment of facilities for the delivery of gas from producer to pipeline may result in needlessly higher costs to the pipeline's customers. The facilities required for direct delivery from wellhead to main transmission line can be costly. If existing facilities linking the pipeline to a particular producer's wells are abandoned, new facilities will often be necessary to enable the pipeline to tap a substitute source of supply. The costs of financing and operating the substitute facilities will be borne by the pipeline's ratepayers, and these costs may be higher than the comparable costs of the existing facilities. Here, again, it is immaterial that in the present case the original cost of the abandoned facilities was slight. Not only may the present case not be representative in this respect, but from the standpoint of the burden to the ratepayers a more pertinent consideration than the cost of the original facilities is the cost of such new facilities as may be required to obtain substitute gas.

(3) Changing the source of supply may produce temporary, but nonetheless serious, delays and disruptions as the producer searches for a new customer and the pipeline for a new supplier. Higher costs

to gas consumers may result. The facts of the present case suggest a further danger—that the pipeline will in the end pay more for gas than if it had not abandoned the existing service (see Statement, *supra*, p. 11 and n. 9). It may seem paradoxical that a pipeline should abandon a cheap source of supply, but it must be remembered that any increased gas costs are ordinarily passed on in full to the ratepayers; price may consequently not be uppermost in the minds of the pipeline's managers. It is, of course, precisely because a regulated public utility is largely immune from the ordinary constraints of competition that Congress has placed the operations of the pipeline companies under comprehensive administrative control.

Considerations of policy similar to those canvassed above led this Court in *Sunray* (p. 16, *supra*) to hold that the producer's selling facilities are subject to the abandonment provisions of Section 7(b). We can think of no rational design that could be ascribed to the Natural Gas Act that would justify a lesser obligation on the pipeline purchaser.[12]

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[12] This Court's reference in *Sunray* to the seller's continuing obligation in that case to deliver gas to the purchaser "on the latter's request" (364 U.S. at 155) does not support petitioner's argument that a purchaser is free to abandon his purchases at any time. We believe that that statement, in context, referred to the purchaser's right, under the particular rate schedule involved in *Sunray*, to call for an additional supply of gas up to 150 percent of the specified annual amount. 364 U.S. at 139. Deliveries of gas to a pipeline are, as a practical matter, normally "on request" deliveries—with or without

In pointing to the dangers of unregulated abandonment of gas purchasing facilities, we do not mean to imply that abandonment of such facilities is never permissible. Often, the loss will be slight and will be outweighed by other considerations. For example, the pipeline may no longer need the gas, or it may have available to it a cheaper alternative source of supply; moreover, if the supply tapped by the facilities in question is exhausted, the Commission must permit abandonment (see p. 17, *supra*).[18] We urge only that these are matters which should be presented to the Commission. We think it clear that Congress

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a contract. Thus, the contract in the *Sunray* case, as is frequently true, required the pipeline either to take certain minimum quantities of gas or else pay for it, even if it was not taken. Quantity variations from season to season and day to day are standard operating procedure dictated by the pipeline's operating program of utilizing its combined supplies to meet its constantly fluctuating load (demand) condition. Plainly, gas will be delivered only on request either during a contract or afterward.

Petitioner also cites (Br. 21) the following statement in the *Sunray* opinion: "It is said that petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it" (364 U.S. at 155). But this was not a statement of the Court's position—only of a contention to be answered. As the Commission here noted (R. 404), by prefacing this statement with "'It is said,'" this Court "obviously intended its statement to be read as a paraphrase of counsel's argument, and not as a holding thereon." We emphasize that the issue of the purchaser's abandonment of facilities was not before the Court in that case.

[18] There has been no showing that any of these grounds is present here.

never intended that they be finally resolved by unilateral decision of the pipeline's management.[14]

B. *No Different Conclusion Is Compelled Merely Because the Act Does Not Require Commission Approval of Gas Purchases as Such*

The Natural Gas Act contains no express requirement that purchases, as distinct from transportation and sales, of natural gas be approved by the Commission. Petitioner argues that the Commission's assertion of authority over the abandonment of purchasing facilities is an attempt to supply what Congress studiously omitted. There is no merit to this contention.

1. The Act makes no provision for Commission approval of purchases simply because such a provision would be redundant. The Commission's express statutory authority over transportation (Section 7(c)) necessarily entails broad authority over purchases —authority that petitioner does not challenge.[15] Every

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[14] Congress' unwillingness to cede final decision in matters of abandonment to the pipeline companies is indicated by the rejection in committee, at the time of the deliberations on the Natural Gas Act, of an industry-sponsored amendment to Section 7(b) that would have provided "* * * [t]hat facilities may be abandoned without obtaining such [Commission] permission, approval, or finding, if service is not thereby impaired or if substitute facilities will be installed." See Hearings on H.R. 4008 before House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., p. 127.

[15] This being so, little significance can be attached to the fact that Congress in enacting the Natural Gas Act did not extend its provisions to the "procurement of natural gas"

purchase of gas destined for the interstate market involves transportation that the Commission must approve, and the need for and terms of the purchase are highly relevant in determining whether the transportation is justified by the public convenience and necessity. See, *e.g.*, *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F.2d 143 (C.A. D.C.); *Texas Eastern Transmission Corp.*, 11 F.P.C. 435, 444-445, 449. In addition, the purchase is directly regulated by means of the Commission's broad authority over producer's sales; all producer sales for the interstate market must, of course, be approved under Section 7 (c). See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672. The short of it is that the Act gives the Commission comprehensive and effective authority over a regulated pipeline's purchases—enough, surely, to establish its legitimate concern with the discontinuance of such purchases through abandonment of jurisdictional facilities and the services rendered thereby.

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as had been proposed in bills that would have regulated only natural gas pipeline companies and not producers. H.R. 5711, S. 1919, 75th Cong., 1st Sess.; see Hearings on H.R. 4008 before House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., pp. 1, 10-20. There was no need. Also, it may have been feared that such a provision would conflict with the production and gathering exemption in Section 1(b). See *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 512-513 and n. 16. That exemption does not support limitations on the Commission's authority after the producer's sale takes place.

2. Even assuming that the Commission had no authority with respect to contracts for the purchase of gas, it would not follow that it lacked authority over discontinuances of gas purchases. For Section 7(b) is plainly broader than 7(c). The former reaches all services rendered by means of jurisdictional facilities, whether or not Commission approval of the service was initially required or obtained. It is thus immaterial to the Commission's 7(b) powers whether gas purchases require such approval.[16]

The distinction between initiation and abandonment of service is a familiar one in public utility regulation. See, *e.g.*, 49 U.S.C. 1(18); *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 144-145, 149. It reflects the fact that customers of a public utility often become acutely dependent upon the continuation of the utility's service, even though initially they may have been free to choose among competing services. Abandonment may disturb settled interests in circumstances where commencement of service does not. Even if Congress had thought that a pipeline's purchasing decisions were not so affected with a public interest

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[16] This position is not inconsistent with this Court's assumption in *Sunray* that a limited-time certificate would permit a producer to discontinue its operations at the certificate's expiration. In that case, the Court assumed only that approval of such a limitation amounted to an authorization under Section 7(b) to abandon the certificated service at the conclusion of the certificated period. The certificate granted United for the operation of these facilities and for transportation of gas by means of them was unlimited in duration. Cf. *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170.

as to require regulation, it would still have had reason to conclude that a decision to discontinue purchasing, because of its potential impact upon producers and existing customers of the pipeline, should be reviewed by the Commission.

The history of Section 7 of the Natural Gas Act make this plain. Originally, the Act required a natural gas company to obtain a certificate of public convenience and necessity only if it proposed to provide service to an area already being serviced by another natural gas company. See 52 Stat. 825. Yet Section 7(b)—unchanged since the original act—has at all times required Commission approval of any abandonment of jurisdictional facilities or of services rendered thereby. Thus, until 1942, when the Commission received its present broad certification powers (see 56 Stat. 83), its authority over abandonment of services was much broader than its authority over their initiation.

II

The Expiration of the Purchase Contract with the Producer Gives the Pipeline No Greater Right of Abandonment

In Point I, we considered whether an exception to the requirements of Section 7(b) of the Gas Act is warranted where the abandoned facilities relate to the acquisition of the gas by the pipeline from the producer. Here we consider the bearing of the purchase contract between pipeline and producer, and argue that United's position is not strengthened by the fact that abandonment was predicated upon the expira-

tion of the contract. Preliminarily, we point out that petitioner's approach was expressly rejected by this Court in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, which holds that a producer may not abandon selling facilities merely because his obligation under the contract has terminated. See, also, *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170.

A. There is no conflict between the Commission's assertion of authority and the terms of United's contract with Continental. The contract provided for purchases at the contract rate during its ten-year term and for termination of the contract at the end of the term. It did not purport to govern the parties' dealings after termination. During the term of the contract, United was entitled to purchase at the contract rate, but upon expiration of the contract that right lapsed and the only restrictions upon the parties' dealings were those of the statute.

To be sure, the scope of free contractual bargaining is somewhat diminished if pipeline and producer may not (without Commission approval) agree that the termination of the contract shall terminate all aspects of the purchasing arrangement. However, that is already the result under decisions of this Court that petitioner does not challenge (*Sunray* and *Sun Oil*, *supra*), which hold that the producer may not cease supplying the purchaser without Commission approval even though his contract with the producer has expired. If one party may not cancel the arrangement unilaterally, neither should the other be entitled to do so. The decision below does no more than create

symmetry in the obligations of producers and pipelines, and we submit that the bargaining process is strengthened—not weakened—by thus placing the parties on a bargaining parity.

B. If there were a conflict here between freedom of contract and fulfillment of the regulatory objectives of the Gas Act, there would be no question which should prevail. Congress did not intend that natural gas companies be free to bargain away the right of the public to efficient service and to the orderly and economical exploitation of the nation's gas resources. Administrative supervision of the contractual arrangements of natural gas companies is indeed comprehensive. The contract between United and Continental in this case was twice reviewed by the Commission: in approving Continental's application for approval of the sale of gas under the contract and in approving the transportation of that gas by United. The Commission could have rejected these applications—thus in effect nullifying the contract. Or it could have imposed under Section 7(e) extensive conditions upon its approval. See, *e.g.*, *Federal Power Commission* v. *Hunt*, 376 U.S. 515; *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378. It could also have modified the contract during its term (see p. 26, *infra*). In light of these extensive powers, we submit that the United-Continental contract cannot be interposed as a bar to requiring Commission approval of abandonment of the facilities employed in the performance of the contract.

United Gas Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332, lends no support to petitioner's position. The

Court held there that a natural gas company was not free to file a rate different from that permitted by a valid and subsisting contract, but it made clear that the Commission retained full power to modify the contract, and permit filing of a different rate, if the public interest warranted. 350 U.S. at 344-345. See, also, *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348. Furthermore, the corollary of *Mobile*, as the Court pointed out in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U.S. 103, 112-113, is that, where the contract permits, seller may unilaterally change his rate—and *a fortiori* where the contract has expired. *Ibid.*; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 155.

C. This brings us to the final point to be considered: the rate at which United must take gas from Continental after expiration of the contract. Since, as we have argued, United was required to obtain Commission approval before abandoning its purchase arrangement with Continental, the Commission was entirely justified in requiring United to continue its purchases at the post-contract rate filed by Continental while an application for abandonment (if any were made) was being considered and determined. United objected to the rate filed by Continental only on the ground that it was unauthorized, and not because it was unjust, unreasonable or discriminatory. It did not ask that the rate be suspended or that it be collected subject to refund. And, of course, it sought no authorization to abandon. Having been filed and not having been suspended by the Commission, Con-

tinental's rate became the lawful rate, and United was required to abide by it until it received authorization to abandon under Section 7(b).

When its contract with a particular producer to take gas from a particular field expires, a pipeline may have legitimate reasons for discontinuing this source of supply. The supply may be exhausted; the pipeline may no longer need the gas; it may be able to obtain substitute gas cheaper elsewhere. Or, though the source is satisfactory, the post-contract rate filed by the producer may appear undue. In either event, the Act provides perfectly adequate remedies—either abandonment proceedings or rate proceedings. There is no occasion, we submit, to imply a further remedy—unilateral, unregulated abandonment—that runs squarely counter to the fundamental regulatory objectives of the Act. There are many cases where abandonment of a particular source of natural gas supply is a wasteful, disruptive, imprudent, and needlessly expensive response to the change of circumstances brought about by the expiration of the original contract. We submit that the Commission has authority to avert such consequences.

So urging, we do not contend for a novel or strained interpretation of the applicable statutory provision. We ask only that it be given its natural and literal meaning. Section 7(b) requires Commission approval to abandon any jurisdictional facilities or a service rendered by means of them, and United's facilities for taking the gas from Continental in the Johnson Bayou Field are conceded to be jurisdictional. Our reading,

moreover, merely recognizes that the Commission's authority over the abandonment of gas purchasing arrangements is commensurate with its authority under Section 7(c) over their initiation and with its Section 7(b) authority—confirmed by this Court in *Sunray*—over producers' abandonment of facilities used in selling to pipeline companies like petitioner.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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SEPTEMBER 1966.

APPENDIX

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833 as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows:

Section 4(d) and (e):

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in

writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5(a):

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Section 7(b), (c), and (e):

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available sup-

ply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

* * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified ap-

plicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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Number 49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED GAS PIPE LINE COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I.

CONGRESS DID NOT INTEND THAT THE TERM TRANSPORTATION, AS USED IN THE ACT, ALSO INCLUDE PURCHASING

Having previously acknowledged that "Section 1(b) does not explicitly bring within the Commission's regulatory power the purchase of natural gas", the Commission argues in its brief on the merits that its "* * * authority over the transportation of gas subsumes broad regulatory power over purchasing" (F.P.C. Brief, page 9). In an obvious effort to extend its jurisdiction, the Commission strains to interpret "transportation of natural

gas", as used in the Act, to include "purchase of natural gas".(1)

There is no legislative history, or record of industry usage, which suggests that Congress either thought or intended that "transportation" included "purchasing" when applied to natural gas. And having declined to adopt legislation which would have brought the "procurement of natural gas" within the Commission's jurisdiction and having shown by the language in Section 1(b) that it knew "transportation" did not include "sale", it is certain that Congress was not confused as to the meaning of "transportation", and it is equally certain that Congress did not intend that "transportation" include "purchasing".

In *Border Pipeline Company v. Federal Power Commission*, 171 F. 2d 149, D.C. Circuit (1948), the Commission presented the court with a strikingly parallel effort to expand its jurisdiction. There the Commission sought to have the court interpret "interstate commerce" as used in the Act to include "foreign commerce". In rejecting the Commission's efforts the court pointed out that "foreign commerce" had been included in Title III, H. R. 5423, 74th Congress, First Session, but that Congress had failed to adopt that bill as the Natural Gas Act, and the court held it could not write into the Natural

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(1) Curiously this reliance on "transportation" is at variance with the Commission's holding in Opinion 426 (R. 471-489). There the Commission placed its reliance on its authority to authorize the abandonment of "facilities".

Gas Act a provision which Congress had affirmatively omitted. Judge Prettyman, writing for a unanimous court, reiterated familiar principles of statutory construction when he said:

> "We add a further word upon the subject, because the situation with which we are here confronted is of general importance. Questions such as the one presented in this case are properly for the Congress. The circumstances upon which they arise are familiar. Congress uses expressions of established meaning. It takes action of recognized implications; e.g., it strikes from a pending bill a clause of clear import. But the administrative body finds a sufficient penumbra of meaning to justify a claim to more authority than appears upon the face of its grant. It asserts the extended authority and thus forces the issue upon the courts. It asks the courts to divine an intent on the part of Congress and then to decree that the words of the statute spell that intent. Of course, if there be a plain intent, or purpose, or objective, the statute must be deemed to be in pursuit of it, and the courts will enforce that view. But where relatively plain language and congressional conduct of accepted implication point one way and the contrary appears only through strained and complex assumptions and deductions, questions which the administrators may have as to the full intent and desirable scope of the congressional action ought to be addressed to the Congress."

If the Commission's numerous arguments for granting it jurisdiction to regulate the purchasing or procurement of gas are persuasive, the Commission should pre-

sent them to Congress; and, at the same time, it should present additional amendments to the Act needed to guide the Commission in this new area of regulation and to protect the purchaser subject to the new regulation.

Everything about the Act: its legislative history, its statement of jurisdiction, the certificate section, the abandonment section, the right to contract which it preserves, and the Commission's 38 year record of interpretation and enforcement say that the Commission's jurisdiction does not extend to the purchasing or procurement of gas. Nevertheless, in the words of Judge Prettyman, the Commission has chosen to present to this Court its "penumbra of meaning to justify a claim" to the contrary, and this petitioner must reply.

II.

THE OBVIOUS FALLACY IN THE COMMISSION'S *RELIANCE ON THE ABANDONMENT* SECTION OF THE ACT

The Commission's basic position, reflected in its show cause order and in its Opinion, is that it has authority to require purchasing in order to prevent the unauthorized abandonment of facilities. The obvious fallacy in this argument is that the abandonment section of the Act cannot be broader than Section 1(b). If Section 1(b) does not grant the Commission jurisdiction to require purchasing, then the abandonment section cannot do so.

The Commission's discussion of its view of what constitutes an abandonment, and the consequences thereof, cannot extend the Commission's jurisdiction beyond that defined in Section 1(b). Even if a cessation of gas flow constitutes an abandonment of facilities, which United denies, that does not extend the Commission's jurisdiction beyond that defined in Section 1(b).

Plainly, purchasing or procurement of gas does not come within the jurisdictional limits prescribed by Section 1(b), and no amount of reliance on the abandonment section can give the Commission jurisdiction to require purchasing.

III.

THE COMMISSION'S ARGUMENTS WHY ITS JURISDICTION EXTENDS TO PURCHASING

A. Necessary To Prevent Abandonment Of Facilities

As indicated above, the Commission's central argument is that the cessation of flow of gas through United's purchase facilities constituted an abandonment of those facilities and assuredly Congress intended that the Commission have authority to prevent a cessation of purchasing in order to prevent an abandonment of facilities.

The obvious reason for this round-about approach — from facilities, to flows, to abandonment, to purchasing — is that the abandonment section does not include

purchasing. The words purchasing or procurement of gas do not appear in the section.[2]

The omission of purchasing from Section 7(b) is, of course, consistent with the Act's coverage as set out in Section 1(b), and is affirmative proof that the Act does not require the Commission's approval for a cessation of purchasing.

B. Necessary To Prevent An Abandonment Of Transportation

The argument is advanced in this Court that the cessation of gas flow constituted an abandonment of transportation, and that the Commission has authority to require purchasing in order to prevent the abandonment. Everything United has said in response to the Commission's argument on abandonment of "facilities" has equal application here. If the Commission's jurisdiction does not extend to the purchasing or procurement of gas, then the Commission does not have authority to require purchasing in order to prevent the abandonment of transportation.

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(2) Section 7(b). "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]."

The Commission's brief implies that every time a pipeline initiates a purchase of gas from a producer, the pipeline must obtain a certificate of public convenience and necessity authorizing it to transport that gas. But this is not the fact. It has been the Commission's practice to issue a certificate of public convenience and necessity authorizing the construction and operation of the pipeline's facilities. Once such facilities have been placed in operation, pipelines have universally made additional purchases of gas for transmission through these facilities without any additional certificate authorization from the Commission. The Commisson's brief is therefore incorrect in suggesting that purchases of gas by pipelines require the existence of a certificate authorizing the transportation of the gas.

C. Necessary To Prevent An Abandonment Of Service

Arguing in the same vein, the Commission says the cessation of gas flow through United's Johnson Bayou Field facilities constituted an abandonment of service which the Commission has authority to prevent by requiring United to purchase Continental's gas. Again, United's response to the Commission's argument based on abandonment of facilities applies equally to the argument based on abandonment of service. And, United adds to this response the fact that it renders no "service" to Continental. The term service as used in Section 7(e) and Section 7(b) of the Act, has been consistently interpreted to mean the furnishing of gas to the purchaser.

In this respect the Solicitor General, on behalf of the Commission, has represented to this Court that the term "service" was the furnishing of gas to the purchaser. The Solicitor's statement, found at page 23 of the Commission's brief in *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 364 U.S. 137, is as follows:

> "As that term is used in Section 7(e) — when read together with Section 7(b) and other provisions of the Act — the 'service' is the continuous furnishing of the gas to the purchaser."

United has discontinued no service to Continental, and neither has it discontinued service to any of its customers. However, the Commission has expressed fear that if a pipeline purchaser has the right to discontinue purchasing upon the termination of its contract with the producer, then the pipeline has the power to render itself unable to continue "service" to its customers. But the solution the Commission suggests is no answer to that problem. The Commission authorizes pipelines to initiate service to customers upon a showing of gas reserves adequate to provide a 12-year deliverability life for the pipeline's annual sales requirements.(3) And, even if the Commission could force the pipelines to withdraw every foot of gas attached to their systems, the Commission and the public would yet depend on the pipelines voluntarily purchasing additional gas reserves in order to remain in business. Obviously, Congress thought the

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(3) Section 2.61 of the Commission's General Policy And Interpretations, 18 C.F.R. 2.61.

profit motive was sufficient to keep interstate pipeline companies from withdrawing from business and that is the reason it declined to give the Commission jurisdiction over the purchasing or procurement of gas by pipelines.

D. Necessary To Prevent Higher Costs To Pipeline's Customers

The Commission argues that the power to require purchasing is needed in order to prevent pipelines from discontinuing the use of existing facilities and building more expensive, substitute facilities. And it argues the power is needed in order to prevent the pipelines from buying more expensive gas. These arguments defy reality. Facilities that are no longer used or useful are removed from the rate base, and the investment and return on these facilities are lost to the stockholders. Moreover, much gas is sold at contractually fixed prices and increased costs cannot be passed on under those sales. These considerations, as well as sound business practices, forbid the unprofitable approach the Commission envisions.

United emphasizes that its presence in this lawsuit reflects its determination to keep its gas costs down and to be able to sell gas at contractual fixed prices. It has engaged in this 4-year contest because it is convinced that the course which the Commission advocates will result in United paying higher costs for gas than it would pay if it can retain its power to bargain with producers. United is equally convinced that in exempting direct industrial

gas sales from Commission jurisdiction and in permitting gas to be sold at contractual fixed prices Congress thought and intended that pipelines would be able to control their gas costs by contracting with producers. It was for these reasons that United resisted Continental's insistence that it could compel United to purchase its gas at an increased price and on terms fixed unilaterally by Continental.

E. In Order To Strengthen The Bargaining Process

The Commission argues that if it can compel a buyer to buy gas and pay the seller's unilaterally fixed price, that will strengthen the bargaining process. But just the opposite is true, for it will destroy the pipeline's bargaining power.

As interpreted by the Commission, the Act permits Continental to exact from United not only a market for its gas but the maximum price and most favorable terms which the Commission will allow, now or in the future. There is no area remaining for bargaining between Continental and United. United has been stripped of all bargaining power.

IV.

THE COMMISSION'S RESPONSE TO *SUNRAY*

The Commission argues that this Court's reference in *Sunray* (364 U.S. at 155) to the seller's obligation to continue delivering gas on the buyer's "request" after expiration of its sales contract, unless it could justify

an abandonment before the Commission, does not support United's position. It says it believes the Court's statement had reference to the purchaser's right *under the contract* to call for delivery on any day of up to 150% of the average daily purchase requirements. But the Commission is wrong in this assumption, for the Court was not referring to obligations *under the contract.* The Court was careful to say it was referring to an obligation which would come into existence "when it [i.e. the contract] expires".

The Commission argues further that all gas is, in any event, "delivered on request" and that the Court's statement recognized a mandatory duty to request delivery of gas after expiration of the contract. United thinks the Court's language had no such strained or complex meaning. The producer's delivery and the pipeline's purchase obligations are fixed by contract, not by "request". Clearly, this Court's reference in *Sunray* to the buyer's right to "request" deliveries, after expiration of its sales contract, was intended to have the ordinary and usual meaning reflected in United's argument.

V.

THE ACT DOES NOT PROVIDE PIPELINES WITH ADEQUATE REMEDIES AGAINST BEING FORCED TO TAKE GAS ON DISADVANTAGEOUS TERMS

The Commission makes no reply to the constitutional issue United raises other than to say it is premature because the Act provides pipelines with adequate remedies against being forced to take gas on disadvantageous

terms, and that United has not invoked the remedies. These adequate remedies, according to the Commission, consist of the Commission's power to review the producer's rates, and the right in the pipeline to apply to abandon the purchase.

The glaring inadequacy in these supposed remedies is that they cannot be employed by the Commission to protect the interests of the pipeline. To emphasize the seriousness of this problem, United repeats that it sold in excess of one-half trillion cubic feet of gas directly to industrial customers in 1965, at prices which were for the most part contractually fixed at specific levels. The suggested remedies provide no procedure by which United, or any pipeline, can recover from such sales the increased rates of producers, and neither do they provide a procedure by which pipelines can be relieved from the increased rates of producers simply because the return realized by the pipelines from such sales is less than fair.

The Commission's power to review the producer's rates provides the pipeline no remedy whatever with respect to this problem. The justness and reasonableness of the producer's rates are measured by the producer's needs, not by the pipeline's.

The other remedy to which the Commission points is for the pipeline to apply for permission to abandon the purchase. But the inadequacy of this remedy is apparent. Since the available gas supply has not been depleted, the Commission cannot authorize an abandonment under Section 7(b) simply because a transaction is

unprofitable to the pipeline. This rigid restriction upon the Commission's powers was pronounced in *United Gas Pipe Line Company v. Mobile Gas Corporation*, 350 U.S. 332, and restated with particularity in *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 348, 76 S. Ct. 368, 100 L. ed. 388, as follows:

> "* * * But, while it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. Cf. Arkansas Natural Gas Co. v. Arkansas R. Com. 261 US 379, 67 L ed 705, 43 S Ct 387. In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest — as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed 'is necessary in the public interest.' When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility."

As United reads these decisions, it would be entitled to an abandonment only if it could show that the increased cost of Continental's gas impaired its financial

ability to continue its service. Clearly this is no remedy at all against being forced to take gas on "disadvantageous terms". The remedies suggested by the Commission do not exist and United's constitutional issue is valid.

Respectfully submitted,

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October 7, 1966

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1966.

United Gas Pipe Line Company, Petitioner, *v.* Federal Power Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November 14, 1966.]

Mr. Justice White delivered the opinion of the Court.

United Gas Pipe Line Company and Continental Oil Company executed a contract effective January 31, 1953, providing for the sale by Continental and the purchase by United of gas produced from the Johnson Bayou Field in the State of Louisiana, at prices stated in the contract. The contract was to run for 10 years and from year to year thereafter unless terminated by either party on 90 days' notice. To effectuate delivery to United's nearby Mud Lake transmission line for transportation of the gas into the Beaumont, Texas, area, Continental constructed several thousand feet of pipeline, separators and storage tanks. United, for its part, constructed a short length of pipeline, a separator, a meter station and valves. United sought, was granted and accepted a certificate of public convenience and necessity authorizing the continued transportation of gas from the Johnson Bayou Field and the construction and operation of the facilities necessary therefor. 14 F. P. C. 582. Likewise, Continental was issued a certificate authorizing the sale of gas to United under the terms of the contract. 15 F. P. C. 1650.

In October 1962 Continental elected to terminate the contract at the end of the primary term. Negotiations for a new contract were fruitless. Continental, after re-

fusing United's offer to continue purchasing on a day-to-day basis at the old contract rate, filed a rate increase with the Commission asking for an effective date of January 31, 1963. The Commission accepted the filing over United's protest.[1] United, after advance notice to Continental, then ceased purchasing gas from the Johnson Bayou Field on January 31, 1963, and has since refused to purchase gas from that source. Following a petition by Continental, an order to show cause issued by the Commission to United and a full hearing, the Commission found that United, by ceasing to take gas from the Johnson field, had abandoned its facilities used for this purpose as well as the service rendered by these facilities, contrary to the provisions of § 7 (b) which forbid such abandonment without the consent of the Commission being first obtained.[2] Accordingly, the Commission ordered United to "renew operation of its Johnson Bayou Field facilities used to purchase gas from Continental" and directed that the purchases by United were to be at Continental's new rate and in volumes consistent with the terms of the contract previously in force. 31 F. P. C. 1079, 1086. The Court of Appeals upheld the Commission's order, 350 F. 2d 689, and we granted certiorari, 383 U. S. 924, because the case involved an important question concerning the

[1] United unsuccessfully petitioned for rehearing of the Commission's order approving the rate increase, 29 F. P. C. 525, but did not seek judicial review of the order.

[2] Section 7 (b) of the Act provides that "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 52 Stat. 824, 15 U. S. C. § 717f (b).

Commission's jurisdiction under the Natural Gas Act. We affirm.

We agree with the Commission and the Court of Appeals that United's refusal to continue receiving gas from the Johnson Bayou Field constituted an abandonment of "facilities" and a "service" to which § 7 (b) applies. That section places conditions on the abandonment of facilities or of any service rendered thereby. The facilities covered by the section are those "subject to the jurisdiction of the Commission," the further identification of which requires resort to other sections of the Act. Section 1 (b)[3] declares that the provisions of the Act are to apply to (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale for ultimate public consumption and (3) natural gas companies engaged in such transportation or sale. Under § 7 (c)[4] no natural gas company is permitted to engage in the transporta-

[3] The text of the section provides: "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 52 Stat. 821, 15 U. S. C. § 717 (b).

[4] The text of the section, in relevant part, provides that "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . ." Added by the Act of February 7, 1942, 56 Stat. 83, 15 U. S. C. § 717f (c).

tion or sale of natural gas, or to undertake the construction or extension of facilities therefor without a certificate of public convenience and necessity authorizing such acts or operations. Thus the "facilities subject to the jurisdiction of the Commission" which are reached by the abandonment provisions of § 7 (b) are those facilities required for the interstate transportation of natural gas and for the interstate sale of gas for resale to the ultimate consumer. Conversely, it would seem beyond argument that the proscription of abandoning "any service" rendered by those facilities would include both transportation and sale, the twin functions which subject the facilities to the provisions of the Act.

We are convinced that United's Johnson Bayou Field facilities were subject to the jurisdiction of the Commission. They were constructed solely for the purpose of the taking and interstate transportation of Johnson Bayou gas. They could not, therefore, be abandoned without the consent of the Commission and we do not understand United's position in this Court to be otherwise. United, however, insists that there has not in fact been a § 7 (b) "abandonment." It is true that the Johnson Bayou Field facilities were neither removed nor disconnected. Their use could have been resumed at any time had United so desired. But the physical alteration of facilities is not a *sine qua non* restricting the Commission's jurisdiction under § 7 (b). Here United ceased taking and transporting gas from the Johnson Bayou Field on January 31, 1963, has not taken that gas or used its facilities constructed for that purpose since that time and has no intention of doing so as long as Continental's present rates continue in effect. United, the Commission found, had by its own action rendered its facilities "operationally dormant for a period of indefinite duration." 31 F. P. C. 1079, 1083. In addition, the Commission found that its interest went beyond the

physical alteration of facilities. "We have a regulatory responsibility to assure that gas once dedicated to the interstate market will continue to be available to that market so long as the public interest demands . . . ." 31 F. P. C. 1079, 1082. As the instant proceeding unmistakably revealed, the Commission's responsibility could not adequately be met if it was powerless to assure that facilities "certificated to transport this gas," *ibid.*, continued to operate. To hold United's conduct an abandonment within the meaning of § 7 (b) is a reasonable interpretation of the Act and we shall not disturb it.

The corollary conclusion, inescapably presented by the face of the Act itself, is that the consent of the Commission is necessary before United can cease taking and transporting Johnson Bayou gas, since this is a service United rendered through the facilities it constructed for that very purpose. United, however, contends that the words "any service" in § 7 (b) include only the sale of natural gas, not the taking and transportation of gas from any particular field. In its view it is free at any time to abandon the interstate transportation of gas from the Johnson Bayou Field, and to decide for itself wholly apart from the Commission what gas it will continue to transport interstate. But nothing in the Act, its legislative history or in our cases has been called to our attention which persuasively supports this narrow view or which would justify recognizing the sale of gas as a service but not the preceding transportation without which there would be no sale at all.

The Act gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale. *FPC* v. *East Ohio Gas Co.*, 338 U. S. 464; *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1; *Panhandle Eastern Pipe Line Co.* v. *FPC*, 359 F. 2d 675.

Here, of course, the transportation is not for hire but for sale, some for consumption and some for resale. What is more, in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137, 149–150, the Court clearly recognized that the term "service" is not confined to sales but extends to the "movement of gas in interstate commerce" and that one who engages in *either* the sale or the transportation of gas is performing a service within the meaning of both §§ 7 (e) and 7 (b). It could not be more clear that United here abandoned a "service," the taking of Johnson Bayou Field gas and its transportation in interstate commerce. The statutory necessity of prior Commission approval, with its underlying findings, cannot be escaped.

Even so, United argues that the Act gives the Commission no authority over the purchase of natural gas, and that the Commission therefore exceeded its jurisdiction in ordering United to continue purchasing gas from Continental in amounts specified in an expired contract and at prices set unilaterally by Continental. It is true that the Act does not in so many words grant the same express authority over purchases to the Commission that it does over sales. Neither is there a blanket exemption of Commission jurisdiction over the purchase of gas, and there is express authority over transportation as well as sale. Under § 16, the Commission has the power "to perform any and all acts, and to . . . issue . . . such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this Act." 52 Stat. 830, 15 U. S. C. § 717o. Where it is necessary to regulate the purchase of gas in some respects to carry out its expressly granted authority over transportation and sale, the Commission must have the power to do so. In the case before us, there has been a § 7 (b) abandonment of facilities or services without Commission consent. It is therefore quite proper for the

Commission to order the facilities reactivated and the abandoned service restored, even though the resumption by United of the transportation of gas from the Johnson Bayou Field will entail the purchase of gas from Continental at the legally established price. Undoubtedly, the continued purchase of gas has been ordered but only as an incident to regulating transportation or sale. This is no more than the Act authorizes and no more than United undertook to do when it sought and received certification for the service it sought to perform.[5]

After United had begun to purchase gas from the Johnson Bayou Field in 1953 and to transport it to markets in the State of Texas, United sought a certificate of public convenience and necessity authorizing the construction and use of the facilities it had built and the continued transportation of the Johnson Bayou gas. United then asserted that the public convenience and necessity required the issuance of such a certificate.[6] Both the construction and operation of the facilities and the *transportation* of gas by means thereof were found by the Commission to be required by the public convenience and necessity. United was found "able and willing . . . to perform the *service* . . ." for which it had volunteered.[7] A certificate was accordingly issued and formally accepted by United. United now wishes to abandon the express service it agreed to perform—the continued transportation of Johnson Bayou gas—with-

[5] What we have said, of course, does not imply that the Commission has the power to compel initial purchases of gas. We reach only the question of the Commission's power under § 7 (b) to order reactivation of abandoned facilities and service.

[6] United's application for the certificate, docketed September 20, 1954, appears in FTC Docket No. G–2818, United Gas Pipe Line Company.

[7] The Commission's complete order appears in Docket G–2818, *supra*, note 6; an abbreviated version appears in 14 F. P. C. 582. (Emphasis added.)

out a § 7 (b) finding by the Commission "that the present or future public convenience or necessity permit such abandonment." This is precisely what the Act forbids.

United claims that it does not need the Johnson Bayou gas to serve its customers and that the forced purchase of gas at prices set by Continental and approved by the Commission without regard for the prices at which United under contract or competition is bound to sell the gas deprives it of property without due process of law. In our view, these claims are premature. We do not hold that it would be inappropriate for the Commission to permit abandonment in this case if it is asked to do so and the necessary findings are made. We hold only that United has abandoned facilities and service without the consent of the Commission and that it must reactivate those facilities and restore the service until and unless the statutory consent is obtained. If United now resorts to the Commission, it will have every opportunity to present its economic and constitutional grounds for abandonment.

For the reasons herein stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.